

1 FEDERAL TRADE COMMISSION

2 I N D E X (PUBLIC RECORD)

3

4 WITNESS: DIRECT V-DIRE CROSS REDIRECT RECROSS
 5 Egan 7852 7871 (US) 7937 (US) 7989 7996 (US)
 6 7921 (SP) 7972 (SP)

7

8 EXHIBITS FOR ID IN EVID

9 Commission

10 Number 522 7975

11 Number 524 7909

12 Number 526 7929

13 Schering

14 None

15 Upsher

16 Number 1634 7948 7950

17

18 OTHER EXHIBITS REFERENCED PAGE

19 Commission

20 CX 523 7979

21 CX 525 7981

22 Schering

23 None

24 Upsher

25 USX 538 7881

For The Record, Inc.
 Waldorf, Maryland
 (301) 870-8025

1 FEDERAL TRADE COMMISSION

2

3 In the Matter of:)

4 SCHERING-PLOUGH CORPORATION,)

5 a corporation,)

6 and)

7 UPSHER-SMITH LABORATORIES,) File No. D09297

8 a corporation,)

9 and)

10 AMERICAN HOME PRODUCTS,)

11 a corporation.)

12 -----)

13

14 Friday, March 15, 2002

15 11:30 a.m.

16 TRIAL VOLUME 33

17 PART 1

18 PUBLIC RECORD

19 BEFORE THE HONORABLE D. MICHAEL CHAPPELL

20 Administrative Law Judge

21 Federal Trade Commission

22 600 Pennsylvania Avenue, N.W.

23 Washington, D.C.

24

25 Reported by: Susanne Bergling, RMR

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 KAREN G. BOKAT, Attorney

5 MELVIN H. ORLANS, Attorney

6 ROBIN MOORE, Attorney

7 Federal Trade Commission

8 601 Pennsylvania Avenue, N.W.

9 Washington, D.C. 20580

10 (202) 326-2912

11

12

13 ON BEHALF OF SCHERING-PLOUGH CORPORATION:

14 JOHN W. NIELDS, Attorney

15 LAURA S. SHORES, Attorney

16 MARC G. SCHILDKRAUT, Attorney

17 Howrey, Simon, Arnold & White

18 1299 Pennsylvania Avenue, N.W.

19 Washington, D.C. 20004-2402

20 (202) 783-0800

21

22

23

24

25

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 ON BEHALF OF UPSHER-SMITH LABORATORIES:

2 ROBERT D. PAUL, Attorney

3 J. MARK GIDLEY, Attorney

4 CHRISTOPHER M. CURRAN, Attorney

5 White & Case, LLP

6 601 Thirteenth Street, N.W.

7 Suite 600 South

8 Washington, D.C. 20005-3805

9 (202) 626-3610

10

11

12 ON BEHALF OF AMERICAN HOME PRODUCTS:

13 EMILY M. PASQUINELLI, Attorney

14 Arnold & Porter

15 555 Twelfth Street, N.W.

16 Washington, D.C. 20004-1206

17 (202) 942-5667

18

19

20

21

22

23

24

25

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Good morning, everyone.

4 ALL COUNSEL: Good morning, Your Honor.

5 JUDGE CHAPPELL: Ms. Bokat, any news on
6 scheduling?

7 MS. BOKAT: Yes, Your Honor. Complaint counsel
8 will not be calling Daniel Bell.

9 JUDGE CHAPPELL: Okay.

10 MS. BOKAT: We conferred again with our two
11 experts, Dr. Levy and Professor Bazerman, to see if
12 they could come earlier in the week next week, but it
13 is not possible.

14 JUDGE CHAPPELL: So, we've got Levy Monday?

15 MS. BOKAT: Professor Bresnahan on Monday.

16 JUDGE CHAPPELL: Bresnahan.

17 MS. BOKAT: Dr. Levy on Thursday and Professor
18 Bazerman on Friday.

19 JUDGE CHAPPELL: As for the briefing schedule,
20 were the parties going to submit anything in writing or
21 just what you told me yesterday? I don't need anything
22 in writing, but I didn't know if you had prepared
23 something.

24 MS. BOKAT: We had not -- well, we hadn't.

25 MS. SHORES: We had not either, Your Honor.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 MR. NIELDS: Your Honor, we had not prepared
2 anything.

3 MR. CURRAN: No, we had had discussions among
4 the three parties.

5 JUDGE CHAPPELL: And I intend, as I said
6 yesterday, I am going to key it from the last day of
7 trial rather than from the last day of the decision
8 being done. I'll work out something and let everybody
9 know next week.

10 Anything else?

11 MS. SHORES: Yes, Your Honor, I had one issue
12 to raise.

13 JUDGE CHAPPELL: Okay.

14 MS. SHORES: This concerns the Court's ruling
15 yesterday with respect to Dr. Levy, and please don't
16 misunderstand me, I'm not asking for reconsideration.
17 A question did occur to me after we adjourned. I was
18 too slow to think of it while we were still here.

19 The question is this: For purposes of
20 preparing for Dr. Levy, may I assume that Dr. Levy will
21 be testifying about the issues that complaint counsel
22 raise in their brief that it was necessary to bring him
23 back for, their brief in the opposition to the motion?

24 JUDGE CHAPPELL: I would assume they didn't
25 mislead us, Ms. Shores.

1 MS. SHORES: Thank you, Your Honor.

2 JUDGE CHAPPELL: Okay. However, I did -- I did
3 say yesterday I will allow him, so you're prepared, to
4 testify in rebuttal to things that he offered in his
5 expert report.

6 MS. SHORES: So, these are new things that have
7 never been disclosed to us that --

8 JUDGE CHAPPELL: Not that I know of, no. I'm
9 just saying I don't want you to be unprepared. I don't
10 know what's going to happen once we get started.

11 MS. SHORES: Okay. I mean, they identified
12 three issues that they needed to bring him back for to
13 testify in rebuttal. Obviously those were three issues
14 of the myriad issues in his report. I just wanted to
15 clarify -- I want to ask the question, I want to
16 clarify that we are not going to cover his entire
17 report again.

18 JUDGE CHAPPELL: Well, that's a good point, and
19 I'm holding them to what they submitted and told the
20 Court that they wanted to bring him back for, but
21 within the bounds -- I didn't want to make it too
22 broad. What I'm doing is narrowing, not making it
23 broader. It's within the bounds of the expert report
24 those items that were brought to our attention.

25 Is that clear?

1 MS. SHORES: Thank you, Your Honor.

2 JUDGE CHAPPELL: Anything further?

3 Call your next witness.

4 MS. BOKAT: Complaint counsel call James Egan.

5 JUDGE CHAPPELL: Raise your right hand, please.

6 Whereupon--

7 JAMES J. EGAN

8 a witness, called for examination, having been first
9 duly sworn, was examined and testified as follows:

10 JUDGE CHAPPELL: Thank you, have a seat.

11 State your full name for the record, please.

12 THE WITNESS: James Jackson Egan.

13 DIRECT EXAMINATION

14 BY MS. BOKAT:

15 Q. Good morning, Mr. Egan.

16 A. Good morning.

17 Q. What is your educational background since high
18 school?

19 A. I attended Georgetown University from 1968 to
20 1972, graduated with a Bachelor of Science in foreign
21 service. I attended the University of Santa Clara Law
22 School from 1972 to 1975 and obtained a doctorate of
23 law degree.

24 Q. Are you currently employed?

25 A. Yes.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Q. By whom?

2 A. I work as a senior vice president for licensing
3 and corporate development at Novirio Pharmaceuticals in
4 Cambridge, Massachusetts.

5 Q. What is the business of Novirio?

6 A. Novirio is a company that is developing drugs
7 for hepatitis, HIV, AIDS, a number of other viral
8 diseases, and cancer potentially.

9 Q. How long have you been with Novirio?

10 A. I've been at Novirio since September of this
11 year.

12 Q. Would that be September 2001?

13 A. Oh, September 2001, excuse me.

14 Q. What are your responsibilities with Novirio?

15 A. I'm in charge of all mergers and acquisitions,
16 strategic planning, licensing, product acquisitions,
17 product dispositions, and constructing the strategic
18 and commercial operating plan.

19 Q. Where were you employed prior to Novirio?

20 A. I was employed at NeuronZ in Auckland, New
21 Zealand.

22 Q. When were you employed at NeuronZ?

23 A. I was employed at NeuronZ from September 1st of
24 2000 through June 2001, and actually, let me correct my
25 earlier statement. I was working at Novirio from July

1 of 2001 but not physically present in Boston at that
2 point. I was physically present in Boston from
3 September.

4 Q. What was your position at NeuronZ?

5 A. I was a chief executive officer.

6 Q. Where did you work prior to NeuronZ?

7 A. I worked at Pharmacia and prior to that, in its
8 different merger configurations, Monsanto/Searle, and I
9 worked there from approximately 1993 to the time I
10 joined NeuronZ in September of 2000.

11 Q. What positions did you hold with Searle?

12 A. I was a director of licensing initially,
13 licensing and business development, although the titles
14 changed from time to time, and then I was later senior
15 director for the same activities.

16 Q. What were your responsibilities at Searle?

17 A. At Searle I was responsible for both in and
18 out-licensing for -- from time to time it was
19 anti-infectives, other times it was cardiovascular,
20 other times it was inflammatories, immunomodulators,
21 different therapeutic classes, and also from time to
22 time platform technology evaluations and enabling
23 technologies, like formulation and things of that
24 nature.

25 Q. Were you responsible for both in-licensing and

1 out-licensing?

2 A. I was.

3 Q. What geographic areas did those licenses cover?

4 A. Our group was for the global licensing
5 activities. We very rarely considered local regional
6 deals, and we worked in consort with people that were
7 looking for regional deals, but by and large we were
8 looking for global deals in the licensing and business
9 development group.

10 Q. When you were with Searle, how many licensing
11 possibilities did your group consider?

12 A. Oh, there were literally hundreds of them a
13 year. Each one of us, and I think there were seven of
14 us, would review 30, 40, 50 a month, something like
15 that.

16 Q. Did you ever have any dealings while you were
17 with Searle in-licensing with Schering-Plough?

18 A. Yes, I did.

19 Q. How many dealings did you have with
20 Schering-Plough?

21 A. I think we contacted Schering-Plough with
22 respect to our IIb/IIIA inhibitors. I think we also
23 contacted them with respect to our protease inhibitors
24 for HIV. I think we contacted them -- or they
25 contacted us with respect to our anti-inflammatory

1 franchise, Celebrex and products of that nature.

2 MS. SHORES: Your Honor, pardon me. Objection,
3 this is outside the scope of the description of his
4 testimony in the witness list, Searle's dealings with
5 Schering-Plough.

6 MS. BOKAT: I'm just laying the background of
7 this witness and what his experience has been in
8 licensing, because his testimony is going to be about
9 the licensing possibility of Upsher-Smith's Niacor and
10 Kos' Niaspan.

11 JUDGE CHAPPELL: This is just background,
12 though.

13 MS. BOKAT: Yes, Your Honor.

14 JUDGE CHAPPELL: All right, I'll allow it.
15 Overruled.

16 BY MS. BOKAT:

17 Q. Of those dealings with Schering, were those
18 out-licenses from Searle or in-licenses from Schering?

19 A. For those --

20 MS. SHORES: Same objection, Your Honor.

21 THE WITNESS: For those activities, it was --

22 JUDGE CHAPPELL: Excuse me, we have an
23 objection.

24 THE WITNESS: Oh, I'm sorry.

25 MS. SHORES: It's fine for her, I suppose, to

1 lay a foundation that he had some dealings with
2 Schering-Plough, but I don't see what details we need
3 about those. I don't see why they're relevant to
4 anything in the case.

5 MR. CURRAN: Your Honor, I make the same
6 objection. There's no need for this witness to address
7 a foundation -- lay any foundation with regard to his
8 dealings with Schering-Plough when the designated
9 testimony relates to his dealings with Upsher-Smith and
10 Kos.

11 JUDGE CHAPPELL: Well, I agree. We can -- you
12 can let him tell us some of his general background and
13 knowledge, but he is a fact witness, so we don't need
14 to get into the details about dealings with
15 Schering-Plough. So, to that extent, your objections
16 are sustained.

17 MS. SHORES: Thank you, Your Honor.

18 BY MS. BOKAT:

19 Q. Prior to Searle, did you work for any other
20 pharmaceutical companies?

21 A. I worked for Abbott Labs prior to working for
22 Searle.

23 Q. When did you work for Abbott Labs?

24 A. I worked for Abbott Labs from 1983 to 1994 --
25 '84 to '93, excuse me.

1 Q. I'm sorry, 1984 to 1993?

2 A. That's right.

3 Q. What positions did you hold at Abbott?

4 A. I was in the legal department at Abbott,
5 international legal counsel. The titles changed,
6 again, but it was basically responsibility for
7 international legal transactions in the regions I was
8 assigned, Canada, Asia, Africa, Middle East, other
9 areas, and sometimes globally in terms of licensing
10 deals we would work on either global or regional rights
11 from time to time.

12 Q. So, did your responsibilities in the Abbott
13 legal department have anything to do with licensing?

14 A. Yes, it did.

15 Q. What were your responsibilities with regard to
16 licensing?

17 A. I would work with the licensing department in
18 developing the terms of major licensing deals,
19 negotiate frankly the more intricate terms in a
20 licensing deal. The broader outline of terms would be
21 discussed between the people in the licensing
22 department, and the more particular terms dealing with
23 liability, with timing, with development issues would
24 be done by the people in the legal department.

25 Q. How many licensing deals were you personally

1 involved in while you were with Abbott?

2 MR. CURRAN: Objection, Your Honor. In the
3 recent brief in which complaint counsel was defending
4 their rebuttal witnesses, they said in footnote 31, "We
5 do not seek to present Mr. Egan as a surrogate expert
6 on licensing."

7 The only possible relevance of this witness'
8 history of employment and dealings in licensing at an
9 employer even before Searle, which is the employment
10 he's designated to testify about, has got to be
11 irrelevant or solely to establish this fact witness as
12 a surrogate expert.

13 MS. SHORES: Same objection, Your Honor.

14 MS. BOKAT: I'm just trying to establish for
15 the Court the knowledge Mr. Egan brought to the
16 proposal from Upsher-Smith for Niacor-SR.

17 JUDGE CHAPPELL: I'll allow her to establish
18 his background generally in licensing, but I think
19 everybody understands this is not an expert witness,
20 just to alleviate your concerns, Mr. Curran. So,
21 you're overruled.

22 MR. CURRAN: Thank you, Your Honor.

23 MS. SHORES: Thank you, Your Honor.

24 MS. BOKAT: May the court reporter read back
25 the last question, please?

1 (The record was read as follows:)

2 "QUESTION: How many licensing deals were you
3 personally involved in while you were with Abbott?"

4 THE WITNESS: Large deals, perhaps six to a
5 dozen. Minor deals, it could have been tens, maybe
6 40-50, something like that.

7 BY MS. BOKAT:

8 Q. I'd like to focus now on your time with Searle.
9 Did Searle have a procedure for evaluating in-license
10 opportunities?

11 A. Yes, we did.

12 Q. What was that procedure?

13 A. Well, normally the --

14 MR. CURRAN: Objection, Your Honor. I object
15 to the extent this calls for any testimony beyond what
16 is specifically necessary for this witness to testify
17 about Searle's dealings with Upsher-Smith or Kos.
18 Anything further about licensing evaluation processes
19 are irrelevant.

20 MS. BOKAT: Your Honor, I am going to be asking
21 Mr. Egan about the process Searle applied to two
22 licensing opportunities, one from Upsher-Smith as to
23 Niacor-SR and the second one from Kos as to Niaspan.

24 JUDGE CHAPPELL: Which he has direct knowledge
25 of, correct?

1 MS. BOKAT: That's correct. I was trying to
2 establish the procedure at Searle that was applied to
3 those two licensing opportunities.

4 MR. CURRAN: Your Honor, if that's the
5 question, I'll withdraw that objection, but I believe
6 the question posed and the question pending was much
7 broader in scope than one relating specifically to the
8 dealings with Upsher-Smith or Kos.

9 JUDGE CHAPPELL: Well, since he's going to tell
10 us about evaluating a license with Upsher, I think it's
11 a fair question to lay a foundation for his background.
12 So, it's overruled.

13 Susanne, would you read back the question?

14 (The record was read as follows:)

15 "QUESTION: What was that procedure?"

16 THE WITNESS: Well, the procedure itself was
17 generally applied. It had some forms of absolute
18 observance and some that, you know, were more or less,
19 but more or less here's what happened. Products and
20 product opportunities would typically come into the
21 licensing and business development group. They might
22 come in through regional groups. They might come in
23 through scientists, but by and large, they were
24 referred to the licensing and business development
25 group for initial evaluation.

1 We would look at the first product profile of
2 what was coming in, evaluate it, see if it came in it
3 would fit what our product planning strategy might be,
4 and then do a first rough cut evaluation as to whether
5 we would want to proceed further.

6 Typically, a great percentage of the
7 opportunities that came in unsolicited didn't have much
8 merit, and so we were operating largely as a screening
9 process in avoiding burning up valuable time and
10 resources on things that really weren't worthwhile.
11 So, you might end up with things that were either too
12 early, too speculative, had no commercial promise, no
13 scientific merit, and we would operate as a first
14 review process and winnow out the majority and often
15 times really the vast majority of those opportunities
16 that came in.

17 As a second stage, if we felt there was
18 something worthy of inquiry, we would start a process
19 of review where we would first go to somebody who knew
20 the science in the area and somebody in the commercial
21 area who knew what the needs were specifically for a
22 commercial candidate product to be brought in. The
23 first cut was usually called a sniff test, where you
24 would ask somebody who was a scientist, who knew the
25 area pretty well, about the first nonconfidential

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 profile of the product, just say, gee, is this worth,
2 you know, any more time or effort than what we've got?

3 And if he said, sure, this is worthwhile, then
4 we'd probably go to the commercial people and say, the
5 science guy likes this, why don't you look at it
6 commercially? They would give you the first commercial
7 sniff and say, you know, this looks like it might be
8 worthwhile.

9 If that came back, then we would probably look
10 and see if there was patent coverage on that. You
11 could do a quick search through public databases with
12 our patent department, the search engines were pretty
13 good at that point, and evaluate whether there was
14 something to speak further.

15 If there were something to speak further, then
16 we would usually contact the people that had offered it
17 to us and ask them for either a more full
18 nonconfidential presentation, usually that would be in
19 writing, or for more full explanation over the phone of
20 what they had going and then see if it really validated
21 out what they had said. It was, again, a credibility
22 check at that point.

23 If that were worthwhile, and we usually did
24 another cycle through the system of the scientists and
25 the lawyers and the commercial people, then we would

1 ask them for confidential data and usually ask them to
2 come in and have a head-to-head meeting about it.

3 The reason you go through these levels of
4 review early is because so many of these things are
5 turned down as not having any merit. You really have
6 to make sure that you don't overspend your efforts on
7 stuff that isn't going to go anywhere, and just putting
8 a confidentiality agreement in place, although it
9 sounds, you know, trivial, it's usually a couple of
10 pages, usually the lawyers on either side get involved
11 and there's a process of a couple weeks to do that.
12 So, by having a confidential meeting, you're really
13 serious about hearing what they have to say.

14 Then at the confidential meeting, you would
15 hear what the presentation was, and you would ask
16 yourself whether there was something here that's
17 genuinely a fit and whether you would identify that as
18 a project for potential licensing that you would work
19 on or not.

20 If it was, then you would try to pursue it
21 further. You'd start working up perhaps financial
22 modeling on it. You would see with the commercial
23 franchise whether the product fit in the product
24 planning cycle and would fit with the sales force
25 planning cycle. You'd also talk to the scientists as

1 to whether it fit in your discovery plans for the
2 products they were developing and might be going
3 forward with, and you'd try to come up with a consensus
4 report to ask for authority to start some kind of
5 commercial negotiation.

6 Typically that would require a first cut by
7 people with the authority to authorize a spend, because
8 then you're starting to burn up substantial time and
9 resources of all of those different groups I've just
10 talked about, and you're starting to talk about the
11 ability to make a commitment in funds to anybody who
12 might be on the other side who you would be negotiating
13 with.

14 After that, you'd have another series of
15 meetings with them on the confidential data, and then
16 if your people thought it made the cut, if it was good,
17 then you would really start in earnest doing full-blown
18 evaluations of all of this. You'd burn up a lot of
19 time and resources in terms of commercial projections,
20 financial projections, scientific evaluations, go/no-go
21 decisions on the scientific merit.

22 Then you'd take it up to, you know, the highest
23 levels in the company. You'd take it to the chief
24 operating officer, chief scientific officer, the chief
25 executive officer and get their tentative buy-in into

1 it.

2 Once you had that, you had negotiating
3 authority, then you'd start talking with the parties in
4 earnest. You'd usually get responses back and forth,
5 pretty much be regular reporting back and forth, and
6 then at the end, you'd bring in what you thought was a
7 final economic proposal, and you would propose it to
8 the CEO and the board, and the CEO and the board, if
9 they liked it, would authorize the closing of a deal.
10 Then you'd negotiate and close it.

11 But again, the process was one of winnowing
12 out. I mean, you would start with literally thousands
13 of opportunities a year, and you would end up with a
14 very small handful, maybe two, three or four in a year
15 that you might do.

16 Q. You mentioned at the beginning, in the initial
17 evaluation, that you were looking at a product profile.

18 A. Right.

19 Q. Could you explain what you meant?

20 A. Well, any incoming candidate has to have a
21 profile as to whether it's got any therapeutic benefit
22 or commercial potential based on its therapeutic
23 benefit. You'd want to know whether the drug was safe,
24 whether it had side effects, whether it had efficacy
25 for an unmet medical need, whether it was something you

1 could differentiate from other products and therefore
2 have a commercial advantage in promotion.

3 You'd want to know whether the product was one
4 that would have a long patent life or a long
5 exclusivity. You'd want to know whether it was
6 something that had an ability to work with other
7 products, whether your sales force, in detailing this
8 product, would also improve their credibility in
9 detailing other related products. There was a large
10 mix of considerations in terms of the product profile
11 you had to consider when going into one of these
12 evaluations.

13 Q. You mentioned that even in this nonconfidential
14 stage, some of the scientists looked at it. Is that
15 right?

16 MS. SHORES: Objection, Your Honor. Again, I
17 just want to make clear that we object to this
18 testimony if it's being offered to compare in any way
19 to what due diligence procedures are used in the
20 industry generally.

21 I also object to narrative answers. I think
22 now I understand how we got to a two-and-a-half-hour
23 projection for this witness' direct testimony. It
24 seems to me we don't need all this if we are just going
25 to get to the consideration of the Niacor deal.

1 JUDGE CHAPPELL: I sustain your objection to
2 narrative. Ms. Bokat, you are going to have to ask
3 more pointed questions so that in the event someone
4 wants to object, they will have an opportunity, without
5 letting the witness go on for five minutes.

6 As to this being used against Schering-Plough,
7 that's understood.

8 MS. SHORES: Thank you, Your Honor.

9 BY MS. BOKAT:

10 Q. You mentioned in this initial review that the
11 scientists were involved. What kind of scientists were
12 those?

13 A. Typically it would be a discovery-level
14 scientist within the franchise within which the product
15 would fall. Searle had directed and specialized its
16 efforts against specific therapeutic franchises, one
17 for cardiovascular disease, one was for arthritis and
18 inflammation, another was for anti-infective, and other
19 ones from time to time would come up. They would
20 consider being in diabetes, for example, other ones
21 like that.

22 Q. You mentioned at a later phase a consensus
23 report.

24 A. Um-hum.

25 Q. Was that a consensus of certain people or

1 positions within Searle?

2 A. Sure.

3 MR. CURRAN: Your Honor, I object. These
4 questions are untethered to negotiations between Searle
5 and Upsher-Smith or Searle and Kos. They appear to be
6 hypothetical in nature. The witness has already
7 testified that these procedures weren't always
8 followed. The only thing that's relevant is what
9 Searle did in the negotiations with Upsher-Smith.

10 JUDGE CHAPPELL: I agree, that's sustained. We
11 need to get to the point, the reason why we were told
12 this witness was coming in, Ms. Bokat.

13 BY MS. BOKAT:

14 Q. Mr. Egan, in 1997, were there discussions
15 between Searle and Upsher-Smith about a potential
16 license from Upsher to Searle?

17 A. Yes.

18 Q. What product or products were involved?

19 A. Upsher-Smith had a sustained release niacin
20 called Niacor-SR that they wanted to talk about.

21 Q. Was that the only Upsher product involved?

22 A. The only one I recall.

23 Q. At that time, did Searle have any interest in a
24 sustained release niacin?

25 A. We had a general interest in niacin in general,

1 and we wanted to know about all niacin products that
2 were coming up.

3 Q. Had Searle at that point done any work on a
4 niacin product?

5 A. We had our own internal program that was
6 evaluating analogs of niacin that would give its
7 therapeutic benefit and avoid its toxicity and its side
8 effects.

9 Q. Why was Searle interested in a niacin -- a
10 niacin analog?

11 A. Because the market that it would serve and the
12 mechanism that it would use in that market offered the
13 promise of potentially a very large product. That
14 market, the hyperlipidemia or atherosclerosis market,
15 is one of the largest segments in the pharmaceutical
16 industry, and if there is a product that is effective
17 and safe and doesn't have a side effect profile that
18 discourages its use, it has a substantial potential
19 commercially.

20 Q. What side effects were you just referring to?

21 A. Niacin, when it's used generally, causes some
22 very unpleasant side effects --

23 MR. CURRAN: Objection, Your Honor. I ask for
24 voir dire if this witness is going to testify about
25 side effects of particular chemical compounds.

1 JUDGE CHAPPELL: You can do it now or during
2 cross. What's your choice?

3 MR. CURRAN: I'd prefer to do it now, Your
4 Honor.

5 JUDGE CHAPPELL: Go ahead.

6 VOIR DIRE EXAMINATION

7 BY MR. CURRAN:

8 Q. Mr. Egan, I'm Chris Curran, we met at your
9 deposition about a year ago.

10 A. Yes, I do.

11 Q. Sir, you're not a toxicologist, correct?

12 A. No.

13 Q. And you're not a pharmacist, correct?

14 A. No.

15 Q. You're not a pharmacologist, correct?

16 A. No.

17 Q. You're not a cardiologist, correct?

18 A. No.

19 Q. You're not a lipidologist, correct?

20 A. No.

21 Q. You're not a medical doctor at all, correct?

22 A. No.

23 Q. You didn't attend medical school, correct?

24 A. No.

25 Q. You didn't take the medical boards, correct?

1 A. No, I did not.

2 Q. You've never treated patients professionally?

3 A. I have not.

4 Q. You've never diagnosed patients professionally?

5 A. I have not.

6 Q. You've never written prescriptions, have you?

7 A. I have not.

8 Q. You've -- you mentioned before you went to
9 Georgetown. You majored there and you graduated there
10 from the School of Foreign Service, correct?

11 A. That's correct.

12 Q. And from there you went to law school?

13 A. That's correct.

14 Q. So, you have got no formal medical training,
15 correct?

16 A. I have no formal medical training.

17 Q. In fact, sir, when you were working at Searle,
18 you relied on scientists to provide you with medical
19 opinions and advice, correct?

20 A. In some settings, not all, I did, yes.

21 Q. And sir, in connection with your dealings with
22 the Upsher-Smith product, you relied on scientists for
23 the medical -- for their medical views, correct?

24 A. For their medical views --

25 Q. Yeah.

1 A. Yes, I relied on them.

2 MR. CURRAN: Your Honor, nothing further on
3 voir dire. Thank you.

4 JUDGE CHAPPELL: Thank you.

5 Go ahead, Ms. Bokat.

6 MS. BOKAT: Did we have a question pending?

7 (The record was read as follows:)

8 "QUESTION: What side effects were you just
9 referring to?

10 "ANSWER: Niacin, when it's used generally,
11 causes some very unpleasant side effects --"

12 BY MS. BOKAT:

13 Q. What were those side effects?

14 A. They are listed in the label --

15 MR. CURRAN: Your Honor, objection --

16 MS. SHORES: Objection, foundation, Your Honor.

17 MR. CURRAN: Your Honor, my objection is
18 similar. It's based on Rule 701 of the Federal Rules
19 of Evidence, which state that the opinion of a lay
20 witness is only admissible if it's rationally based on
21 the perception of the witness and helpful to a clear
22 understanding on the part of the finder of fact and
23 that it's not based on scientific, technical or other
24 specialized knowledge. Given the voir dire, I object
25 to this witness providing an opinion on this subject.

1 JUDGE CHAPPELL: The objection's sustained.
2 The witness, however, was not asked what caused the
3 side effects and, you know, to get into more
4 opinion-type areas. I'll let him tell the Court if
5 he's aware of side effects if he had to know that in
6 relation to his work and working on the license
7 opportunity or anything else regarding his work, but
8 it's not for the opinion of what causes side effects.

9 MR. CURRAN: Thank you, Your Honor.

10 BY MS. BOKAT:

11 Q. With the Judge's admonition, can you answer the
12 question, or do you want me to rephrase it?

13 A. Could you restate the question? I don't know
14 what question I'm answering at this point.

15 Q. Sure.

16 Based on your work in licensing at Searle, did
17 you have information about the side effects of niacin
18 products?

19 MS. SHORES: I'll register an objection here,
20 Your Honor, foundation and potentially calls for a
21 hearsay response.

22 JUDGE CHAPPELL: Well, I'll overrule the
23 hearsay objection if he knows about side effects and he
24 acted on that in his job regarding the licensing, but I
25 want to hear a foundation -- if he's going to tell me

1 about side effects, I need to know how that related to
2 what he had to do.

3 BY MS. BOKAT:

4 Q. Mr. Egan, when you were at Searle, did you in
5 your capacity in the licensing department have occasion
6 to look at licensing prospects among niacin drugs?

7 A. I did.

8 Q. Did you seek any information about niacin
9 products from other personnel at Searle?

10 A. I did.

11 MS. SHORES: Objection, calls for -- not that
12 question, go ahead. I'm sorry.

13 THE WITNESS: I did.

14 BY MS. BOKAT:

15 Q. Did you have information of your own about
16 niacin products?

17 MS. SHORES: Objection, vague.

18 JUDGE CHAPPELL: I think -- I'm not going to
19 tell you how to conduct your direct, but you may be
20 going backwards. You might want to ask him if he had
21 to know about that in relation to his dealings with
22 Upsher. In that regard, I'll allow it, but generally,
23 I don't need to know what he knows about side effects.
24 So, it is vague. Sustained.

25 BY MS. BOKAT:

1 Q. In order to assess Niacor-SR and Kos' Niaspan,
2 did you personally need to have information about the
3 side effects of niacin products?

4 A. Yes.

5 Q. Did you obtain that information?

6 A. Yes.

7 Q. Where did you obtain it?

8 A. Publicly available sources, the Federal Food
9 and Drug Administration approved label on niacin.

10 Q. And what impression did you derive from those
11 sources about side effects of niacins?

12 A. Those that are stated in the label, including
13 flushing, peripheral tingling pain and other side
14 effects called flush or -- I can't remember the exact
15 words. It's in the label on the product.

16 Q. When in 1997 did the discussions between Searle
17 and Upsher-Smith take place?

18 A. I believe it was in early 1997, April-May,
19 something like that.

20 Q. Do you recall what led to the discussions
21 between Upsher-Smith and Searle?

22 A. To my recollection, I think the European group
23 had been looking for niacins as well. They had been in
24 contact with Upsher-Smith in some fashion and said that
25 they would like to come in and present and would like

1 our review and participation in the review.

2 Q. Was there a meeting between Upsher-Smith and
3 Searle?

4 A. I recall one, yes.

5 Q. Where did that take place?

6 A. It took place in Skokie, Illinois, in I think
7 Building 2, 7th Floor, Tower 2.

8 Q. Was that a Searle building?

9 A. It sure was.

10 Q. Did Upsher provide any information about
11 Niacor-SR prior to that meeting?

12 A. They may have. I don't recall necessarily.
13 What I recall was materials presented at the meeting.

14 Q. Who participated in that meeting on behalf of
15 Searle?

16 A. I believe it was -- and I can't be absolutely
17 certain about all the participants in the meeting -- I
18 believe Mary Schwab was there, I think Holly Vene was
19 there, Chris Cramton, Jeff Berg, Jim Stolzenbach, and I
20 think Brian Berzinski (phonetic) was there. I'm not
21 sure one way or the other.

22 Q. What was Ms. Schwab's position with Searle?

23 A. She worked for Holly Vene in Europe in their
24 efforts to do business development on regional
25 products, regional opportunities.

1 Q. Was Ms. Schwab a licensing person?

2 A. No, she was regional business development for
3 regional deals in Europe. Their group mainly operated
4 in business development in the sense of acquisition of
5 companies. They were looking to buy companies to
6 increase their critical mass in Europe, to be able to
7 be an effective marketer in Europe. Occasionally they
8 looked at product opportunities, but it was unusual.

9 Q. What was Holly Vene's position?

10 A. She was a director for European mergers,
11 acquisitions, business development. And commercial
12 operations, as well, she did commercial planning and
13 strategy for them.

14 Q. You mentioned a Chris Cramton.

15 A. Right.

16 Q. Is that a male or a female?

17 A. That's a female. She is one of the members of
18 the cardiovascular therapeutic team, commercial
19 assessment team that was working on the commercial
20 planning and development of the Searle cardiovascular
21 portfolio.

22 Q. You mentioned an individual named Berg?

23 A. Jeff Berg worked for her. He was a deputy for
24 I think it was hypertension. I'm not sure exactly what
25 his group was, but hypertension, hyperlipidemia

1 specifically.

2 Q. Do you know what Ms. Cramton's background was?

3 A. She had worked in blood -- well, I -- she had
4 worked in blood products prior to that at Baxter. I
5 believe she had a business degree. I'm not real sure.

6 Q. You mentioned a Mr. Stolzenbach.

7 A. Um-hum.

8 Q. What was his position at Searle?

9 A. Jim Stolzenbach was in charge of project
10 management. Jim was a pharmacologist, and in project
11 management, he was responsible for orchestrating all of
12 the different disciplines necessary to get preclinical
13 candidates ready for and progressing through clinical
14 trials. He was educated I think at the University of
15 Oregon.

16 Q. What is a pharmacologist?

17 A. Well, a pharmacologist is a -- is a person who
18 is familiar with the science of the application and use
19 of pharmaceuticals for human indications. They are
20 people that will be expert in analyzing a drug
21 substance for its bioavailability, its administration,
22 distribution, metabolism, excretion. He'll be able to
23 evaluate a drug's duration in the body, how long it's
24 going to be there, its local pharmacodynamic effect.
25 It's a very broad expertise that a pharmacologist might

1 possess.

2 Q. What was Mr. Berzinski's position?

3 A. He was working in the cardiovascular clinical
4 group at the time. I believe he was -- well, he was on
5 the clinical development planning group there. He was
6 working on our IIb/IIIa inhibitor, which was a major
7 clinical candidate for us.

8 Q. Do you know what his educational background is?

9 A. I think he graduated from medical school, I
10 believe it was Harvard, and prior to that, I don't know
11 where he went.

12 Q. But he was an M.D.?

13 A. He was an M.D.

14 Q. Were you at that meeting as well?

15 A. I was at that meeting --

16 MR. CURRAN: Objection, foundation, Your Honor.
17 That question assumes that Mr. Berzinski was at the
18 meeting, and the witness has testified he doesn't know
19 if Mr. Berzinski was at the meeting.

20 MS. BOKAT: I could rephrase the question --

21 JUDGE CHAPPELL: Go ahead.

22 MS. BOKAT: -- to move it along.

23 BY MS. BOKAT:

24 Q. Mr. Egan, were you at the meeting with
25 Upsher-Smith?

1 A. I was.

2 Q. Did Upsher-Smith provide any written materials
3 to the Searle representatives at that meeting?

4 A. They did. They provided I believe a copy of
5 their overhead presentation to the people at the
6 meeting.

7 MS. BOKAT: Your Honor, I would like to
8 approach the witness and hand him an exhibit. It is
9 USX 538.

10 JUDGE CHAPPELL: All right.

11 MS. BOKAT: It has already been admitted, and
12 according to our check, it was not granted in camera
13 status.

14 JUDGE CHAPPELL: All right.

15 MS. BOKAT: May I approach the witness?

16 JUDGE CHAPPELL: Yes, you may.

17 BY MS. BOKAT:

18 Q. Mr. Egan, looking at USX 538, is this the
19 written material that Upsher-Smith provided at the
20 meeting with Searle?

21 MS. SHORES: I'll object to this on foundation
22 grounds. It appears that this document was produced
23 out of the files of Upsher-Smith.

24 JUDGE CHAPPELL: Is it in evidence?

25 MS. BOKAT: Yes, it is, Your Honor.

1 MS. SHORES: It is in evidence.

2 JUDGE CHAPPELL: Then she can ask the witness
3 about it. Overruled.

4 THE WITNESS: (Document review.) It appears to
5 be the presentation that I recall seeing there in the
6 first series of pages in what you would call a handout
7 note series, which I recall receiving, but after that,
8 there's another series of these enlarged which seem to
9 track with what the size of the overheads that were
10 actually presented would look like with some
11 handwritten notes in there, and then at the back, there
12 are some -- there's a -- what's described as additional
13 overheads not included as part of the presentation
14 handout.

15 So, it looks like the presentation in the
16 front, then someone's listing of the presentation items
17 again interspersed with their own notes, and then some
18 that I presume to be slides that were not presented but
19 are called additional overheads not included as part of
20 the presentation handout.

21 BY MS. BOKAT:

22 Q. The pages that were part of the handout, what
23 Bates numbers do those cover? There are what I call
24 Bates numbers in the lower right-hand corner of each
25 page.

1 A. Where it says USL you mean?

2 Q. Exactly.

3 A. That would go from USL 11578 through USL 11594.

4 Q. Were there any other written materials provided
5 by Upsher-Smith at the meeting?

6 A. I don't recall them giving anything other than
7 the overheads, which are here.

8 Q. Did the Upsher representatives do any oral
9 presentation?

10 A. Yes, they did.

11 Q. About how long did the meeting last?

12 A. Ninety minutes, something like that.

13 Q. Was the written information -- well, let me
14 back up.

15 At the time of the meeting, was there a
16 confidentiality agreement in place between Upsher-Smith
17 and Searle?

18 A. I believe there was, although I think that was
19 handled by Mary Schwab's group, not mine, so I can't be
20 sure.

21 Q. Was the information given to Searle at
22 Upsher-Smith sufficient for Searle to sign a licensing
23 agreement for the Niacor-SR product?

24 A. No.

25 Q. What additional information did Searle need?

1 MR. CURRAN: Objection, hypothetical, Your
2 Honor.

3 JUDGE CHAPPELL: I'll overrule it if he has
4 personal knowledge of what information was needed.
5 That was his project, wasn't it?

6 BY MS. BOKAT:

7 Q. Was that your project?

8 A. Right.

9 JUDGE CHAPPELL: Go ahead.

10 THE WITNESS: Based upon our evaluation, no
11 additional information they could have given me would
12 have justified a licensing agreement.

13 BY MS. BOKAT:

14 Q. In what geographic area was Upsher-Smith
15 offering Searle a license for Niacor-SR?

16 A. There wasn't any real discussion of the total
17 scope of it. Obviously we would have liked to have had
18 more, both U.S. and Europe, if we had wanted to have
19 it. I think the initiation was related to Europe, but
20 we were hoping to have discussions that would have been
21 global.

22 Q. What phase of clinical trials was Niacor-SR in
23 at the time of the meeting between Searle and
24 Upsher-Smith?

25 MR. CURRAN: Objection, foundation, Your Honor.

1 JUDGE CHAPPELL: Sustained.

2 BY MS. BOKAT:

3 Q. At the time of the meeting, were you aware of
4 what clinical phase Niacor-SR was in?

5 A. At the -- during the meeting, it was
6 represented to us that they were performing pivotal
7 trials for the registration of the drug, phase III.

8 Q. After the conclusion of the meeting with
9 Upsher-Smith, did the Searle people who had been
10 present at the meeting confer among yourselves?

11 A. We did.

12 Q. And approximately when did that occur?

13 A. Immediately after the meeting was over.

14 Q. What was the reaction of the Searle
15 representatives to the information that had been
16 presented by Upsher-Smith at that meeting?

17 MS. SHORES: Objection, hearsay, Your Honor.

18 JUDGE CHAPPELL: Are you offering this for the
19 truth of the matter?

20 MS. BOKAT: I'm offering this for Mr. Egan's
21 perception -- Mr. Egan is the head of this licensing
22 project -- his perception of what his colleagues
23 thought of the product.

24 JUDGE CHAPPELL: So, you don't care whether
25 what they said was true or false?

1 MS. BOKAT: That's right.

2 JUDGE CHAPPELL: I'll allow it. Overruled.

3 THE WITNESS: That the project was not a
4 licensing candidate, that we had no interest in further
5 pursuing the product.

6 BY MS. BOKAT:

7 Q. Did you personally have any interest in
8 pursuing the product?

9 A. I had no further personal interest in pursuing
10 the product.

11 Q. Why was that?

12 A. Because I believed the product had a toxicity
13 profile that suggested that it was not going to be a
14 successful drug.

15 MS. SHORES: Objection, move to strike, lacks
16 foundation. I don't believe that she's laid a
17 foundation for this witness to talk about a toxicity
18 profile based on the voir dire that Mr. Curran did.

19 MR. CURRAN: I join, Your Honor, on the basis
20 of Rule 701. This is improper opinion testimony by a
21 lay witness.

22 MS. BOKAT: Your Honor, this gentleman was in a
23 meeting where Searle was presented information by
24 Upsher-Smith. He and his colleagues took in and
25 processed that information, and as the project leader,

1 he arrived at a decision. I'm trying to find out the
2 reasons for his decision.

3 JUDGE CHAPPELL: Well, I'll overrule the
4 objections. I'm not accepting an expert opinion on a
5 toxicity profile, and he said that he -- the question
6 asked why, and he told us why, but as for foundation, I
7 need to know where did he ever hear about that? I
8 mean, he just mouthed a toxicity profile. I -- you
9 know, there needs to be a connection there.

10 MS. SHORES: And again, Your Honor, just so my
11 position is clear on the record, I would object to this
12 witness testifying if he heard about that from someone
13 else.

14 JUDGE CHAPPELL: Well, I'll overrule that,
15 because it was his project, and he can tell us why he
16 rejected or accepted whatever was going on.

17 Go ahead.

18 BY MS. BOKAT:

19 Q. Mr. Egan, did you have any information about
20 the toxicity of Niacor-SR?

21 A. Yes.

22 Q. What was that information, sir?

23 MS. SHORES: Objection, calls for hearsay.

24 JUDGE CHAPPELL: I'm going to allow that as
25 foundation for what he already testified to. I'm not

1 accepting it as an expert opinion on what toxicity is.

2 THE WITNESS: The information I had was
3 information that was given to me, the assessment of Jim
4 Stolzenbach, who was in the meeting, and the
5 presentation made by Upsher-Smith directly.

6 MS. SHORES: Given that answer, then, I move to
7 strike on the ground that he's just passing on hearsay
8 information from this Jim whatever his name is.

9 JUDGE CHAPPELL: Are you offering his last
10 answer because it's true or because he heard it and
11 acted upon it?

12 MS. BOKAT: Because he heard it and acted upon
13 it.

14 JUDGE CHAPPELL: Overruled.

15 MS. BOKAT: Your Honor, may I look at the
16 realtime to look at that last answer for one minute,
17 please?

18 JUDGE CHAPPELL: Go ahead.

19 MS. BOKAT: Thank you.

20 BY MS. BOKAT:

21 Q. Mr. Egan, I think in that last answer you
22 referred not only to the information provided you by
23 Mr. Stolzenbach but also you referred to the
24 presentation made by Upsher-Smith directly. So, did
25 you personally have information based on that

1 Upsher-Smith presentation about the toxicity of
2 Niacor-SR?

3 A. The information that I saw in the Upsher-Smith
4 presentation, confirming also Jim Stolzenbach's
5 opinion, and my ability to see the data referred to and
6 that Jim actually referred to as well as confirming his
7 logic was also a basis of the conclusion that I came
8 to.

9 Q. Did you personally have a concern about the
10 toxicity of Niacor-SR?

11 A. In my --

12 MR. CURRAN: Objection. Objection as to
13 relevance, Your Honor. His personal views that were
14 never expressed to Upsher-Smith have no relevance in
15 this case.

16 MS. BOKAT: But his views may very well have
17 played into Searle's decision about whether to license
18 the product or not.

19 JUDGE CHAPPELL: I'll overrule the objection.
20 I'll allow him to tell us why he did or did not accept
21 the deal. I'm not -- and again, I'm not accepting it
22 as any expert opinion on these areas. He's a fact
23 witness.

24 MR. CURRAN: Thank you, Your Honor.

25 THE WITNESS: My opinion was, in my role as a

1 licensing person, that I felt that the drug would not
2 be a licensing candidate based upon my assessment of
3 its profile as having potential toxicity.

4 BY MS. BOKAT:

5 Q. After the meeting with Upsher-Smith, did Searle
6 personnel perform any further analysis of Niacor-SR?

7 A. Not much.

8 Q. Did they perform any?

9 A. I believe they talked among themselves to a
10 certain extent, yes.

11 Q. What happened after that in the negotiations
12 between Searle and Upsher-Smith?

13 A. I think we got back with them that we had no
14 further interest.

15 Q. When you were with Searle, were you personally
16 involved in any discussions with Kos Pharmaceuticals
17 about a niacin product?

18 MS. SHORES: Objection, Your Honor. I'd like
19 to ask for exactly what is this rebutting? None of the
20 respondents raised any issue with respect to the
21 discussions between Kos and Searle.

22 MR. CURRAN: I join in that, Your Honor.

23 MS. BOKAT: Your Honor, several of the
24 witnesses testified that Upsher-Smith's Niacor and Kos'
25 Niaspan were of -- were similar, were of equivalent

1 value. Those witnesses include Dr. Horovitz, Mr.
2 Halvorsen, Mr. Lauda, Mr. Troup and Dr. Kerr. In fact,
3 Dr. Kerr testified that he testified the value --
4 excuse me, he tested the value of Niacor-SR as of June
5 1997 against Kos' similar product. He looked at the
6 success and the public record and the ability of Kos to
7 put out a product that was going to be successful.
8 Then Dr. Kerr went on to say that Kos' Niaspan and
9 Niacor-SR were similar.

10 Well, Searle looked at both of these products,
11 Niacor-SR and Niaspan. I was going to ask Mr. Egan
12 about the discussions between Kos and Searle about
13 Niaspan and then the comparison between the two
14 products.

15 MS. SHORES: Your Honor, may I ask for a page
16 and line citation to the portions of the transcript
17 where Dr. Horovitz and Mr. Lauda, the Schering
18 witnesses, testified that Niacor and Niaspan were of
19 equivalent value?

20 JUDGE CHAPPELL: Okay, let's just take a break
21 and get together, counsel confer, and validate your
22 concerns, Ms. Shores.

23 MS. SHORES: Thank you, Your Honor.

24 JUDGE CHAPPELL: And look at the record cites
25 that complaint counsel have.

1 MS. SHORES: Thank you.

2 (Pause in the proceedings.)

3 JUDGE CHAPPELL: Let's go back on the record.

4 MS. SHORES: Your Honor, based on the
5 transcript cites that I saw -- I think you're going to
6 fix this, and I apologize, Karen, if you are -- with
7 respect to Schering witnesses, there was no testimony
8 about the equivalence in value as between Niaspan and
9 Niacor. There was testimony about their equivalence in
10 terms of -- or the comparison between them in terms of
11 strategic value, which is quite different, and I think
12 she is going to re-orient her questions in that regard.

13 MR. CURRAN: I should wait to hear the
14 re-oriented question before I respond to the question
15 that was pending, Your Honor.

16 JUDGE CHAPPELL: Okay, so where we are now,
17 your objections are withdrawn at this point, because
18 she's going to rephrase the question?

19 MS. SHORES: That's correct, Your Honor.

20 MR. CURRAN: Yes, Your Honor.

21 JUDGE CHAPPELL: Go ahead, Ms. Bokat.

22 BY MS. BOKAT:

23 Q. Mr. Egan, before we move directly into Kos
24 then, I would like to go back to the niacin products a
25 little more generally to establish perhaps a link.

1 You mentioned earlier in the day I believe it
2 was a IIb/IIIA inhibitor?

3 A. That's correct, I did.

4 Q. What kind of product is that?

5 A. That was a one-a-day orally bioavailable
6 product that if it had met what we thought its promise
7 would have been would have prevented heart attacks and
8 strokes.

9 Q. Was there any connection between Searle looking
10 at niacin products and this IIb/IIIA inhibitor?

11 A. Yes, there was.

12 Q. What was the connection, sir?

13 A. We had a sales force that was then detailing a
14 Verapamil sustained release product. Calan SR had been
15 a very big product for Searle, Verapamil release
16 product, and we were hoping to register and launch a
17 IIb/IIIA inhibitor called xemlofiban and another one
18 called orbofiban at the time, and we felt that these
19 would be blockbuster products that would require very
20 significant sales force capabilities, specifically
21 focused in the cardiovascular area, to be able to
22 maximize those product opportunities. By
23 "blockbuster," I mean products that had a sales
24 potential of over \$500 million.

25 Q. So, was there any connection between the

1 Niacor -- excuse me, the sustained release niacin
2 products and this cardiovascular sales effort related
3 to the IIb/IIIA inhibitor?

4 A. Right. The fit was that if you had a product
5 that would be in the cardiovascular area and you would
6 be speaking with doctors who had cardiovascular
7 patients and had expertise in cardiovascular area,
8 before you launch the blockbuster drugs, you would have
9 had a basis for being in the doctor's office, building
10 a relationship with him, establishing your corporate
11 name related to a product with the opportunity to
12 support that sales and name recognition effort from the
13 sales you generate from the detailing to the doctors
14 from the cardiovascular products you would take to the
15 doctors.

16 Q. Based on the information that you personally
17 had on Niacor-SR, did you think that Niacor-SR would
18 serve as a bridge for your sales effort to the -- to
19 the IIb/IIIA inhibitors?

20 A. No.

21 Q. Why not?

22 A. We didn't think it had a profile that was
23 registerable or a profile that would have been
24 commercially successful.

25 MS. SHORES: Objection, move to strike as to

1 "registerable" on the grounds that he's not an expert,
2 and also on the ground that we had all stipulated that
3 we weren't going to talk about registration or
4 approvability of Niacor-SR.

5 JUDGE CHAPPELL: Any response?

6 MS. BOKAT: Your Honor, I wasn't asking for his
7 expert opinion. He's a licensing person who is in
8 charge of the product. I'm trying to establish whether
9 he, after looking at the information he had on
10 Niacor-SR, thought it was going to be a sales bridge
11 for his inhibitor product, and he said -- I'm
12 simplifying the --

13 JUDGE CHAPPELL: Well, based on his knowledge,
14 I'm going to disregard the part about whether it had a
15 registerable profile. I'll allow his response
16 regarding the commercially feasible profile.

17 MS. BOKAT: Thank you, Your Honor.

18 JUDGE CHAPPELL: Or commercially successful
19 profile he said.

20 BY MS. BOKAT:

21 Q. Did Searle consider Kos' Niaspan as a possible
22 sales bridge for Searle's IIb/IIIA inhibitor?

23 A. We did.

24 Q. Were there any discussions between Searle and
25 Kos involving a Kos niacin?

1 A. There were.

2 Q. What products, what Kos products, were involved
3 in those discussions?

4 A. I think the --

5 MR. CURRAN: Your Honor, I object. I don't --
6 I'd like to ask for a statement as to what this is
7 rebutting, what from the respondents' case is this
8 relevant to.

9 MS. BOKAT: Again, Your Honor, Dr. Kerr
10 testified about a link in his testing between Niacor-SR
11 and this Kos product, Niaspan. Dr. Kerr testified that
12 he tested the value of Niacor-SR as of the June 1997
13 time period against Kos' similar product. He looked at
14 the success and the public record on the ability of Kos
15 to put out a product that was going to be successful,
16 and then he went on to say that Kos' Niaspan and Niacor
17 were similar.

18 Searle looked at both products. Mr. Egan has
19 described for us the negotiations about Niacor-SR. I'm
20 trying to establish what Searle did with respect to
21 Niaspan and what they thought and did they think the
22 two were similar to rebut Dr. Kerr's testimony.

23 MR. CURRAN: Your Honor, Dr. Kerr was an expert
24 witness. This fact witness cannot be proffered to
25 rebut expert testimony.

1 JUDGE CHAPPELL: He can't offer an expert
2 opinion to rebut it, but if he has factual information,
3 he can use that to the extent he has it.

4 MS. SHORES: Your Honor, may I just register
5 one other objection before you rule? It seems to me
6 that she had said before I thought that the Niacor
7 information wasn't offered for the truth. Based on her
8 last statement, it sounds like it is offered for the
9 truth.

10 JUDGE CHAPPELL: Okay, and tell me again where
11 you're going with this line of questioning. You're
12 trying to demonstrate the comparability of Niaspan
13 versus Niacor?

14 MS. BOKAT: I'm trying -- excuse me, Your
15 Honor.

16 JUDGE CHAPPELL: So, it's comparability or
17 noncomparability of Niaspan versus Niacor?

18 MS. BOKAT: Right, but in order to get to the
19 comparability, I think I have to establish that Searle
20 looked at Niaspan so that he has some basis for
21 comparison.

22 MR. CURRAN: So, it sounds like, Your Honor,
23 this is lay opinion to rebut expert opinion. Dr. Kerr
24 was qualified by the Court with no objection from
25 complaint counsel as an expert in valuation. This is a

1 fact witness with demonstrably no qualifications to
2 opine on the value of scientific and pharmacological
3 products.

4 JUDGE CHAPPELL: Well, I am going to partially
5 sustain and partially overrule the objections. I'll
6 allow him to testify only as to his personal knowledge
7 of what his firm did regarding the two drugs. I don't
8 need a lot of details. We don't need to get into all
9 the details about Kos' product, but if he has personal
10 knowledge of why he accepted or rejected a deal
11 regarding Niaspan, I'll allow that. So, go ahead.

12 BY MS. BOKAT:

13 Q. Let me see if I can pick up my train of
14 thought.

15 There were discussions between Searle and Kos
16 about Kos' Niaspan. Is that right?

17 A. That's correct.

18 Q. But that was the only niacin under discussion
19 between Kos and Searle.

20 A. That's correct.

21 Q. When did the discussions between Searle and Kos
22 take place?

23 A. They took -- around about the same time frame,
24 actually, probably started earlier than the time of the
25 Niacor conversation. It was probably over the course

1 of about a year really, probably early '97 to -- even
2 on to early '98.

3 Q. Did Searle sign a confidentiality agreement
4 with Kos?

5 A. I suspect we did. I don't remember exactly.

6 Q. Were there any meetings between Searle
7 personnel and Kos people about Niaspan?

8 A. Many.

9 Q. Would you describe the first meeting you
10 recall?

11 A. I think the first was a conversation with their
12 licensing people regarding their Niaspan product. I
13 think it was a phone call. I think that was Mr. Patel
14 and I had a conversation. I think I initiated the
15 call, if I'm not mistaken. I basically asked what Kos'
16 plans were about their marketing of the drug and what
17 his thoughts would be about a potential globalization
18 or co-promotion of his product.

19 Q. Why did you initiate that phone conversation?

20 A. Well, because we needed a new product to fit
21 into our cardiovascular franchise, to build our sales
22 force capabilities and to develop our capabilities for
23 the fiban drugs that were coming and to make the
24 current sales force more efficient with the Verapamil
25 products we were promoting.

1 Q. Were there any conversations between Searle and
2 Kos after that phone conversation that you had with Mr.
3 Patel?

4 A. Yes.

5 Q. What was the next conversation?

6 MS. SHORES: Objection, calls for hearsay.

7 JUDGE CHAPPELL: Are you offering it for the
8 truth of the matter or just because it was said and he
9 acted on it?

10 MS. BOKAT: I'm just trying to find out if he
11 had another discussion. I asked whether he had another
12 phone call or a meeting.

13 JUDGE CHAPPELL: I'll allow it, overruled, but
14 I don't need to hear a whole lot about these
15 discussions. Go ahead.

16 THE WITNESS: Yes, there was another meeting.

17 BY MS. BOKAT:

18 Q. Maybe I can try and shorten this for the Court.
19 Rather than taking it meeting by meeting, what Searle
20 personnel was involved in the communications with Kos?

21 A. I was involved, Holly Vene was involved, I
22 believe Rodney Lapp was involved, I believe Doug Zink
23 was involved, I believe Kevin McCollough was involved,
24 I believe Mary Schwab was involved. Those people were
25 involved either directly or indirectly in the course of

1 the conversations and consideration of the Kos Niaspan
2 opportunity.

3 Q. What was Mr. Lapp's position with Searle?

4 A. He was the head of the discovery group
5 reporting to Peter Corr, was head of all discovery for
6 cardiovascular products.

7 Q. What was Mr. Zink's position?

8 A. Doug was in our group. He was in the mergers
9 and acquisitions group there.

10 Q. What was Mr. McCollough's position?

11 A. Kevin was in the sales force planning and
12 marketing planning group for the North American
13 operations.

14 Q. How many meetings were there between Searle and
15 Kos?

16 A. Maybe a half a dozen.

17 Q. What information about Niaspan did Kos provide
18 to Searle?

19 A. They gave a pretty complete presentation of
20 everything, of their clinical trial results, of their
21 sales force planning, of their commercial plan, their
22 expectations of sales, pricing, market penetrations.

23 Q. What geographic areas was Searle considering
24 with respect to a license for Niaspan?

25 A. We were thinking about as much -- as much

1 territory as we could get, both Europe and U.S.
2 certainly.

3 Q. Did Searle perform any analysis of the
4 information provided by Kos with respect to Niaspan?

5 A. Yes, we did.

6 Q. Who performed the analysis?

7 A. I performed some of the analysis. I believe Ed
8 Millon may have also performed some of the analysis,
9 but Kevin McCollough did a lot of the analysis as well.

10 Q. What analysis did you personally perform?

11 A. The analysis I did was one of evaluation of the
12 expected price and expected sales force numbers that
13 they wanted as compared to our own internal
14 capabilities, which was communicated to Kevin
15 McCollough, who made the final decisions on what would
16 and wouldn't be possible. You know, I did some rough
17 evaluations in preparation for a meeting with Kevin,
18 who did go down and meet with Kos in Miami.

19 Q. When you said you did some analysis of expected
20 price, what price were you referring to?

21 A. The price of the Kos Niaspan and the expected
22 numbers of details that would be necessary to get the
23 product sold, that kind of thing. At early stages, I
24 had been talking with Mr. Patel and their other
25 commercial people, and it was only at later stages that

1 Kevin McCollough came in to do the final definitive
2 determination as to whether it was a productive use of
3 our sales force immediately.

4 Q. When you referred to your analysis of the price
5 of Niaspan, were you talking about the price of Niaspan
6 to the customer or the price that Kos might want from
7 Searle?

8 A. Both.

9 Q. And for which geographic areas did you analyze
10 the potential Niaspan price?

11 A. Primarily United States, but we also analyzed
12 Europe. Europe offered particular problems because
13 Europe is very frugal on drug pricing --

14 MR. CURRAN: Objection, Your Honor, going
15 beyond the question.

16 MS. SHORES: Same objection, move to strike as
17 nonresponsive.

18 JUDGE CHAPPELL: Sustained. I'll disregard
19 everything after, "but we also analyzed Europe."

20 BY MS. BOKAT:

21 Q. Why did you analyze the price in Europe?

22 A. Because the pricing that you might expect to
23 get in Europe, particularly on a reformulation of an
24 otherwise generic product, was going to be
25 substantially lower than the price that we would expect

1 to get in the United States.

2 MS. SHORES: Objection, move to strike, lacks
3 foundation. That sounds like expert testimony to me.

4 MS. BOKAT: Your Honor, this gentleman
5 personally did an analysis of pricing. I'm asking him
6 about the results, why he did it and the results of the
7 analysis.

8 JUDGE CHAPPELL: I'll overrule it, and I'm
9 allowing the testimony only for the limited purpose of
10 his work on this deal, not whether this is the word as
11 to all deals and all Niaspan pricing in Europe or the
12 United States.

13 Go ahead.

14 MS. BOKAT: May the court reporter read back
15 the last question, please?

16 (The record was read as follows:)

17 "QUESTION: Why did you analyze the price in
18 Europe?"

19 MR. CURRAN: Your Honor, not to belabor this,
20 but I believe in responding to that last objection, Ms.
21 Bokat said that this gentleman personally analyzed the
22 pricing issues in Europe. If that was a basis for Your
23 Honor's ruling on that, I'd like some voir dire on that
24 point.

25 MS. BOKAT: He's already testified earlier in

1 the day that he's had several years of business
2 dealings with licenses throughout the world.

3 JUDGE CHAPPELL: I'll overrule that. That
4 wasn't the basis of my ruling. I understand that this
5 man is pretty high up in his company and that if he's
6 running the project, he's going to be looking at a lot
7 of things. He's going to be reviewing a lot of things.
8 And as I said, this testimony, this information is
9 limited to deal by deal only. These aren't expert
10 opinions.

11 MR. CURRAN: Thank you, Your Honor.

12 JUDGE CHAPPELL: If he tries to tell me about
13 analyzing this stuff, I'm not accepting that as expert
14 opinion, but you have the right to attack that on
15 cross, Mr. Curran.

16 MR. CURRAN: Thank you, Your Honor.

17 BY MS. BOKAT:

18 Q. Mr. Egan, did Searle and Kos ever get to the
19 stage of discussing compensation for a license from Kos
20 on Niaspan?

21 A. There were beginning conversations about what
22 the outlines of a collaboration might look like. There
23 was a first cut of where their position might be and
24 where our position might be.

25 Q. What was their position as represented to you?

1 A. Well, it changed, as positions do over the
2 course of discussions. The licensing person was
3 relatively accommodating and wanted to keep the
4 discussions going forward, and when it came to hard
5 issues, he tended to become more spongy. From our
6 position, we had always maintained that we wanted a
7 deal where the other party would only get paid if we
8 got paid.

9 In other words, if -- only if we had money or
10 an immediate prospect of money would we want to do a
11 deal with them, because we felt we were going to be
12 putting the lion's share of the effort into it and
13 conferring more value really at a certain level than
14 they might.

15 On their side, there was a desire for some kind
16 of an up-front payment or something else like that and
17 probably a larger split of the revenues in a
18 co-promotion than we would think would be equitable.

19 Q. Did they -- did Kos ever mention an amount of
20 up-front payment they were looking for?

21 A. I think they were talking -- you know, the
22 licensing guy, Patel, was talking, you know, in a
23 modest range, what he would describe as maybe \$5 to \$10
24 million, but we had a subsequent conversation in New
25 York, I think it was with the CEO, Mr. Bell, and he was

1 suggesting that a \$5 to \$10 million payment would be
2 embarrassing to them somehow, but -- he was talking in
3 bigger ranges, but it was pretty clear at that point
4 that we weren't going to make the effort to close the
5 gap with them.

6 Q. Did Searle believe that Niaspan presented the
7 immediate prospect of money for Searle?

8 A. Sure, you could have made some money on
9 Niaspan, but the question is whether you could have
10 made money doing something else -- more money doing
11 something else. I think it was possible, yes, for us
12 to make some money on Niaspan, but basically it was a
13 vehicle for developing a cardiovascular sales force.
14 It wasn't in and of itself a particularly attractive
15 product opportunity.

16 Q. Did Kos make -- I'm sorry, did Searle make a
17 decision with respect to licensing the Niaspan product
18 from Kos?

19 A. We did.

20 Q. What was Searle's decision?

21 A. We decided not to pursue it.

22 Q. Who made that decision?

23 A. That was made by the licensing team, but
24 primarily between myself and Kevin McCollough.

25 Q. What were your personal reasons for not wanting

1 to go ahead with the license?

2 A. We made the determination that the likelihood
3 of us reaching a deal whereby we would recover the
4 productivity of our sales force for this product was
5 low, because the detailing of the product would have
6 been particularly intense and expensive; the price for
7 the product could have been relatively modest; and we
8 had other products in the mix that we could put in the
9 hands of the sales force and -- frankly, in the
10 anti-inflammatory area, a different franchise, that we
11 could have done better on strategically.

12 So, the determination was that the product in
13 and of itself didn't have a whole lot of promise. The
14 cardiovascular franchise, we looked for a different
15 product with more promise as a bridge product, and that
16 we would not do an intensive detail product that had
17 very little prospect of building long-term value and
18 even a long-term bridge into the fiban field.

19 MS. BOKAT: Your Honor, may I approach the
20 witness to hand him an exhibit, please?

21 JUDGE CHAPPELL: Yes, you may.

22 MS. BOKAT: This is CX 524, which has not been
23 admitted into evidence yet. We've checked our records,
24 and we find no evidence that in camera status has been
25 sought for this document.

1 JUDGE CHAPPELL: Do you plan on offering this
2 exhibit?

3 MS. BOKAT: Yes, I do.

4 JUDGE CHAPPELL: Have you asked the other
5 parties if they are going to object to it?

6 MS. BOKAT: No, this was a document that we
7 didn't offer back at the beginning of the trial because
8 it's a third-party document. It came to us from
9 Pharmacia's files. So, we were going to offer it
10 through a live witness. I notified counsel of my
11 intention to use this exhibit with this witness.

12 MS. SHORES: We have no objection to this
13 document, Your Honor, from Schering.

14 MR. CURRAN: Likewise, Your Honor.

15 JUDGE CHAPPELL: Thank you, I just wanted to
16 save us some time.

17 Do you want to offer it now, Ms. Bokat?

18 MS. BOKAT: Yes, Your Honor, I'm sorry, I
19 should have listened to the softball you threw at me.
20 Yes, I would like to please offer in evidence CX 524.

21 JUDGE CHAPPELL: CX 524 is admitted.

22 (Commission Exhibit Number 524 was admitted
23 into evidence.)

24 MS. BOKAT: May I nonetheless hand a copy of
25 the exhibit to the witness?

1 JUDGE CHAPPELL: It's in evidence. You can do
2 anything you want with it, Ms. Bokat.

3 MS. BOKAT: Thank you, Your Honor.

4 THE WITNESS: Thank you very much.

5 MS. BOKAT: You're welcome.

6 I believe it's up on the screen. Would you
7 like a hard copy, Your Honor?

8 JUDGE CHAPPELL: That will be fine if it's on
9 the screen, thank you.

10 MS. BOKAT: Okay.

11 JUDGE CHAPPELL: Are you going to zoom in on
12 that so the spectators can read it, Ms. Bokat?

13 MS. BOKAT: With Ms. Hertzman's assistance, I
14 will do that. I wasn't going to put it on the ELMO. I
15 was going to rely on the computer.

16 JUDGE CHAPPELL: That will be fine.

17 MS. BOKAT: And you can call up individual
18 pages, can you not?

19 MS. HERTZMAN: And if you instruct me on which
20 part of the document you want blown up, I will be happy
21 to do that.

22 MS. BOKAT: Excellent, thank you.

23 BY MS. BOKAT:

24 Q. Could we turn, please, to the page that bears
25 the Bates number 0000038. Those numbers, Mr. Egan, are

1 in the lower right-hand corner of the page.

2 A. Okay.

3 Q. And I'm going to focus for the purposes of the
4 computer on the e-mail in the center of that page.

5 JUDGE CHAPPELL: Ms. Bokat, this is a Pharmacia
6 document. You've confirmed it's not in camera?

7 MS. BOKAT: Yes.

8 JUDGE CHAPPELL: Okay, go ahead.

9 BY MS. BOKAT:

10 Q. Mr. Egan, is that an e-mail from Peter Corr to
11 you?

12 A. It appears to be, yes.

13 Q. There's a reference to the CV Central Team.
14 What was the CV Central Team?

15 A. The CV Central Team was a regular, ongoing
16 communication group that developed the
17 cardiovascular -- it stands for CV planning and
18 execution team. It planned the development for the
19 ongoing products in the pipeline, planned the licensing
20 strategy, and it planned the commercialization
21 strategy. So, discovery, clinical trial and
22 development, licensing, commercial planning, all of
23 that was included in that Cardiovascular Central Team.
24 All the disciplines that went into that, we had maybe
25 30 people attend the CV Central Team meeting. They are

1 all represented.

2 Q. Did the CV Central Team have any role in
3 examining Kos' Niaspan?

4 A. Yes.

5 Q. What role did the CV Central Team play?

6 A. I presented the opportunity to the entire CV
7 Central Team because we got advanced in discussions
8 with them.

9 Q. There's a reference in that e-mail to financial
10 models. Did Searle run any financial models for
11 Niaspan?

12 A. I believe there were some preliminary models
13 that were done, yes.

14 Q. Do you know what models were done?

15 A. I think this one refers to Carolyn. Carolyn
16 Kong in the therapeutic franchise team, which is the
17 group that tries to do the internal financial
18 projections for productivity, did a model here that
19 would have projected what the sales might be for a
20 Niaspan-type product.

21 Q. Was any patent assessment done on Niaspan?

22 A. There was, but it -- yeah, there was a patent
23 assessment.

24 Q. Do you know who did the patent assessment?

25 A. I believe Roger Williams, who is the chief

1 patent counsel, probably put -- I'm forgetting the
2 lady's name. There's a lady from Searle in Skokie that
3 did the evaluation. It's a Polish name, but I'm sorry,
4 I just don't remember it right now.

5 Q. Did she work in Searle's legal department?

6 A. Yeah, she was a patent lawyer.

7 Q. Would you look, please, at the first page of
8 CX 524, and for the purposes of the computer blow-up,
9 I'm going to be focusing first on the third paragraph.

10 This is an e-mail from you, is it not, Mr.
11 Egan?

12 A. It appears to be, yes.

13 Q. The last sentence of the third paragraph reads,
14 "The product profile, however, does not suggest that
15 the investment bankers were particularly rigorous in
16 their analysis or concerned about their credibility
17 when they made their projections."

18 What investment bankers were you referring to
19 there?

20 A. The people who took Kos public.

21 Q. What did you mean by your reference to the
22 rigor of their analysis?

23 A. I'm basically saying in so many words there
24 that there was a shoddy analysis, and they didn't care
25 what people believed of their credibility later on.

1 They just did something to support a public offering to
2 get a particular price out of a stock and that anybody
3 in the industry who looked at it closely would assume
4 that that was an overblown estimate.

5 MS. SHORES: Objection, move to strike. That's
6 clearly speculation, Your Honor.

7 MR. CURRAN: Likewise, Your Honor, and lacks
8 foundation.

9 JUDGE CHAPPELL: Any response?

10 MS. BOKAT: Your Honor, this is a product this
11 gentleman and his team looked at as well in terms of
12 the value.

13 MS. SHORES: Nobody's questioning whether this
14 is a product that they looked at. I'm questioning this
15 witness' ability to speculate about what the investment
16 bankers were thinking.

17 JUDGE CHAPPELL: I'll sustain that as far as
18 what someone else was thinking. The document is in
19 evidence, so it says what it says, and he can tell us
20 if he has personal knowledge, but I don't think he knew
21 about the bankers. I'll disregard that portion of the
22 answer.

23 MS. BOKAT: Thank you, Your Honor.

24 JUDGE CHAPPELL: I believe you also objected on
25 foundation. I think my ruling covers that, because

1 whatever the brokers or bankers were doing, I think we
2 understand he wasn't qualified to tell us that.

3 MS. SHORES: Thank you, Your Honor.

4 BY MS. BOKAT:

5 Q. Mr. Egan, did Searle perform any estimates of
6 what it expected Niaspan's sales to be in the United
7 States?

8 A. Yes.

9 Q. What were the results of that analysis?

10 A. I believe it's stated elsewhere in this
11 document. Our -- yeah, on the second page, our
12 projections fall more in the range of \$10 to \$30
13 million first year, largely from converting existing 14
14 million scrip niacin, so with peak sales somewhat lower
15 than \$100 million. I think the estimates that we had
16 were more in the range of like \$30 to \$50 million peak.

17 Q. Did Searle perform any estimates of potential
18 sales of Niaspan in Europe?

19 A. I think they also looked at Europe as well.

20 Q. Do you recall what the results were of
21 analyzing it in Europe?

22 A. Right, well, they determined in Europe that,
23 again, sales would be difficult and may not be worth
24 the sales effort because the price registration would
25 have been very low, and the detail effort to get people

1 to take the product would have been relatively high.
2 So, I think the sales there were even -- even lower
3 than that.

4 Q. Did Searle perform a scientific analysis of
5 Niaspan?

6 A. Sure, we had people look at Niaspan,
7 scientists.

8 Q. Did those scientists report their results to
9 you?

10 A. They did.

11 Q. What was your perception of the science of
12 Niaspan?

13 MS. SHORES: Objection, hearsay. She's clearly
14 trying to get it in through the back door.

15 JUDGE CHAPPELL: Also, sir, when you see an
16 attorney stand to object, you need to refrain from
17 answering, okay?

18 THE WITNESS: Certainly.

19 JUDGE CHAPPELL: Any response?

20 MS. BOKAT: Yes. I'm asking for his
21 perception. He's the gentleman in charge of licensing,
22 and I want to know what he thought about the product.

23 MS. SHORES: Your Honor, based on her earlier
24 questions, it's clear that what he thought was based on
25 what the scientists reported to him. If it's not, then

1 I don't object to the question.

2 JUDGE CHAPPELL: I'll allow him to testify as
3 to what he knew regarding this issue if it went into
4 his decision making. If it's for that limited purpose
5 only, I'll allow it. So, your objection is sustained
6 in part and overruled in part.

7 MS. SHORES: Thank you, Your Honor.

8 JUDGE CHAPPELL: Do you need Susanne to read
9 back the question?

10 MS. BOKAT: That would be helpful, Your Honor,
11 thank you.

12 (The record was read as follows:)

13 "QUESTION: What was your perception of the
14 science of Niaspan?"

15 THE WITNESS: My perception of the science of
16 Niaspan was that it would improve compliance on niacin
17 therapy versus other niacin dosage regimens, but -- and
18 that improved compliance would have given it commercial
19 promise, some commercial promise.

20 JUDGE CHAPPELL: Ms. Bokat, why don't we take a
21 short recess, ten minutes. We'll recess until 1:30.

22 (A brief recess was taken.)

23 JUDGE CHAPPELL: Ms. Bokat, you may proceed.

24 MS. BOKAT: Thank you, Your Honor.

25 BY MS. BOKAT:

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Q. I think right before the break we were talking
2 about the analysis of Niaspan, and you mentioned it
3 would improve compliance. Would you explain what you
4 meant by that, please?

5 A. From a commercial perspective, one of the
6 biggest problems with niacin was that people have a bad
7 experience with it, a side effect or a toxic experience
8 with it, and based upon that, they don't take it
9 anymore, and if they don't take it anymore, you can't
10 sell them anymore. That was the concern.

11 Niacin has a side effect profile that's in its
12 label, it's known, and you can develop tolerance to it,
13 and the people at Kos had come up with a program of
14 getting people to take relatively low doses to
15 establish tolerance first and then have larger doses so
16 that you can -- a higher dose so you could get better
17 effect and yet not have the immediate side effects
18 which would discourage them from further use.

19 Q. Did Kos' Niaspan have a profile with respect to
20 this patient compliance?

21 A. Sure, they said that people, based upon their
22 projections, not only got on it more freely but stayed
23 on it longer and better than people who took just
24 straight, you know, immediate release, high dose
25 niacin.

1 MS. BOKAT: Your Honor, may I approach the
2 witness to hand him a document?

3 JUDGE CHAPPELL: Yes, you may.

4 MS. BOKAT: Let me just as a preface say this
5 is CX 526. It has not yet been offered in evidence.
6 We have checked our records, and we find no request for
7 in camera status from Pharmacia with respect to this
8 document.

9 JUDGE CHAPPELL: Have you provided this
10 document to the opposing counsel?

11 MS. BOKAT: They got this exhibit along with
12 all our other exhibits back before the trial, and I
13 notified them several days ago that I would be using
14 this document with this witness.

15 JUDGE CHAPPELL: Do you intend to offer it into
16 evidence?

17 MS. BOKAT: I do, Your Honor.

18 JUDGE CHAPPELL: Any objection?

19 MS. SHORES: Lots.

20 JUDGE CHAPPELL: Okay. Basis?

21 MS. SHORES: Actually, I think it would be
22 helpful if I could voir dire the witness on this
23 document once he's had a chance to look at it.

24 MS. BOKAT: And maybe --

25 MS. SHORES: The basis will be authenticity

1 among other things.

2 MS. BOKAT: I might be able to short-circuit
3 some of that. This is -- could I distribute the copies
4 so that everybody can see what I'm talking about?

5 JUDGE CHAPPELL: Go ahead.

6 MS. BOKAT: Maybe at this time I would presume
7 to hand you a paper copy, because there are several
8 pages, and it may be hard to get a sense from flipping
9 them on the computer screen of what Ms. Shores and I
10 are talking about, with the Court's permission.

11 JUDGE CHAPPELL: All right.

12 MS. BOKAT: Thank you. Your Honor, this
13 exhibit consists of a cover memo to Mr. Egan from Mary
14 Schwab and an attached report that I believe was
15 prepared by an outside consultant. I am not offering
16 the attached consultant report for the truth of the
17 contents of that report but just that Searle received
18 it, but I propose to offer the one-page cover memo for
19 all purposes.

20 MS. SHORES: Your Honor, my objection to the
21 enclosure -- I don't have an objection to the cover
22 memo. I do have an objection to the enclosure, not
23 just on hearsay grounds, but also on authenticity
24 grounds. Again, if I might be permitted to question
25 the witness about it, I think I can make my point

1 clear, Your Honor.

2 JUDGE CHAPPELL: What about you, Mr. Curran?

3 MR. CURRAN: Your Honor, I join in Ms. Shores'
4 objection, and I add one. If this attachment is not
5 being offered for the truth of the matter, what is it
6 rebutting from respondents' case?

7 JUDGE CHAPPELL: Ms. Bokat?

8 MS. BOKAT: The document is about Searle's
9 examination of the Kos Niaspan opportunity in Europe.
10 Europe is the same area for Niaspan that Schering was
11 considering.

12 JUDGE CHAPPELL: Mr. Curran, are you talking
13 about the attachment or the cover letter?

14 MR. CURRAN: I'm talking about the attachment,
15 Your Honor.

16 MS. SHORES: Your Honor, my objection goes to
17 authenticity under Federal Rule of Evidence 901. This
18 is a survey. There are specific rules for the
19 admissibility of surveys, and again, if I might be
20 permitted some voir dire, I believe I can make the
21 point clearer.

22 JUDGE CHAPPELL: Go ahead.

23 MS. SHORES: Thank you, Your Honor.

24 VOIR DIRE EXAMINATION

25 BY MS. SHORES:

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Q. Good afternoon, Mr. Egan.

2 A. Good afternoon.

3 Q. Mr. Egan, the cover page of this document
4 indicates it was forwarded to you by Mary Schwab. Is
5 that correct?

6 A. That's correct.

7 Q. And she forwarded that to you, according to the
8 cover page, in March of 1998. Is that correct?

9 A. That's correct.

10 Q. Do you recall seeing this document in 1998?

11 A. I believe I do.

12 Q. And when did you see this document?

13 A. It would have been sometime after or on March
14 4th.

15 Q. Sir --

16 A. To the best of my recollection.

17 Q. Thank you.

18 Did you say you had no recollection?

19 A. To the best of my recollection.

20 Q. To the best of your recollection, thank you,
21 just checking.

22 Sir, in early 1998, where were you employed?

23 A. I was employed at Searle.

24 Q. And that was in Chicago. Is that right?

25 A. Skokie, Illinois.

1 Q. Skokie, Illinois, outside of Chicago?

2 A. In the vicinity, yes.

3 Q. And by whom was Mary Schwab --

4 MR. CURRAN: Pardon me, Your Honor, we can't
5 hear the witness over here.

6 THE WITNESS: In the vicinity, yes.

7 JUDGE CHAPPELL: Mr. Egan, pull that microphone
8 around, it will twist around there. If you want to
9 kick back with your legs crossed, that's okay, but
10 we've got to hear you.

11 THE WITNESS: In the vicinity, yes.

12 JUDGE CHAPPELL: That's the first time we've
13 had the microphone up there.

14 MS. SHORES: That solves a lot of problems, I
15 can't believe we didn't think of it.

16 BY MS. SHORES:

17 Q. And sir, by whom was Mary Schwab employed in
18 March of 1998?

19 A. G. D. Searle.

20 Q. Excuse me?

21 A. G. D. Searle.

22 Q. G. D. Searle. Sir, do you know the name of the
23 company that conducted the interviews that are reported
24 in this document?

25 And first, let me ask you without looking at

1 it, do you independently recall the name of the
2 company?

3 A. No, I do not.

4 Q. And if you look at the document, it indicates
5 that it was prepared by an outfit called Cox Marketing.
6 Is that right?

7 A. That's correct.

8 Q. And it indicates that it was prepared in
9 January of 1998. Is that correct?

10 A. That's correct.

11 Q. You were not employed by Cox Marketing in
12 January of 1998, were you?

13 A. Not to the best of my knowledge.

14 Q. Well --

15 A. No.

16 Q. -- certainly you weren't, all right.

17 And Mary Schwab was not employed by Cox
18 Marketing in January 1998, was she?

19 A. No, she was not, to my knowledge.

20 Q. Sir, you were not involved in conducting the
21 interviews that are reported in this document, were
22 you?

23 A. No, I was not.

24 Q. And you weren't involved in selecting which
25 health care professionals were questioned?

1 A. No, I was not.

2 Q. And you weren't involved in formulating the
3 specific questions that were put to those
4 professionals, were you?

5 A. No, I was not.

6 Q. And you weren't involved in deciding what
7 information would be provided to the interviewees, were
8 you?

9 A. May I look at the report --

10 Q. Certainly.

11 A. -- in order to be able to give an answer to
12 that?

13 Me specifically and directly, perhaps not, but
14 indirectly, through the deliberations of the
15 Cardiovascular Central Team, perhaps some of those
16 directions that ended up in here might have been, you
17 know, part of my concerns expressed to them. I don't
18 know.

19 Q. Well, can you actually tell from this document,
20 sir, what the information was that was provided to the
21 interviewees? I might refer your attention on the --
22 in the table of contents, there's a reference to
23 Appendix 1. Do you see that?

24 A. Discussion Guide for Hyperlipidemia?

25 Q. Right.

1 A. Yes.

2 Q. Is it likely that that would contain what
3 information was provided to the interviewees?

4 A. If that's what it says that the method was and
5 that was the method followed, yes, that included the
6 niacin product profile.

7 Q. And can you find Appendix 1 anywhere in this
8 document, sir?

9 A. In that this is an executive summary or is
10 stamped as an executive summary in certain parts, it
11 doesn't -- it's perhaps not complete, and it does not
12 seem to have an appendix at the end.

13 Q. So, we can't tell exactly what information was
14 provided to the interviewees. Isn't that right?

15 A. From this copy of the report, in that we do not
16 have the appendix attached to it, we do not have
17 knowledge from this particular report copy of what was
18 in Appendix 1; however, if you had the full report with
19 appendices, I assume you would, yes.

20 Q. Right, and that's also true for Appendix 2. Is
21 that correct?

22 A. I believe it applies to all appendices.

23 Q. And Appendix 2, just for the record, is Niacin
24 Product Profile?

25 A. That's correct.

1 Q. That's what that indicates, and we don't know
2 without having Appendix 2 what information was
3 contained in the niacin product profile that was used
4 in the survey, correct?

5 A. That's correct.

6 Q. Now, Mr. Egan, you were not involved in
7 drafting this summary of the responses that were
8 provided by the interviewees, were you?

9 A. No, I was not.

10 Q. Okay. And you weren't involved in developing
11 or implementing the process or system used to conduct
12 this survey, were you?

13 A. This specific survey or surveys in general?

14 Q. This specific survey.

15 A. On this specific survey, no, but to the extent
16 that we did surveys in general, I was involved in the
17 group that designed the guidelines generally for
18 performing surveys.

19 Q. Okay, but with respect to this specific survey,
20 you weren't involved in the process or system used to
21 design it, right?

22 A. Only to the extent that it would reflect the
23 general guidelines in which I did participate.

24 Q. Okay. Turning your attention back again to the
25 table of contents, do you have that?

1 A. Yes.

2 Q. There's a reference there to results. Do you
3 see that?

4 A. Yes.

5 Q. And can you tell us, sir, whether the results
6 of the survey are included within this document?

7 A. In that the table of contents suggests that it
8 carries from page 25 onwards of 81 and pages 25 onwards
9 to 81 are not here, I would assume it is not in this
10 document, although I have not read it in its entirety
11 to be able to say affirmatively one way or the other.

12 MS. SHORES: Your Honor, I'm through with my
13 voir dire. I don't believe this witness -- it's clear
14 that he's not qualified to authenticate this document
15 as required by Rule 901-B-9 of the Federal Rules.

16 JUDGE CHAPPELL: Anything further, Ms. Bokat?

17 MS. BOKAT: No, Your Honor -- I mean, nothing
18 on --

19 JUDGE CHAPPELL: Okay, there is no objection to
20 the first page of CX 526. Is that correct?

21 MR. CURRAN: Yes, Your Honor.

22 MS. SHORES: That's correct, Your Honor.

23 JUDGE CHAPPELL: Okay, CX 526, the first page,
24 is admitted into evidence. The remainder of Exhibit
25 526 I am not allowing into evidence. I find lack of

1 foundational basis. I find lack of indicia of
2 reliability and authenticity.

3 (Commission Exhibit Number 526, as amended, was
4 admitted into evidence.)

5 BY MS. BOKAT:

6 Q. Did Kos decline the Niaspan license opportunity
7 in Europe?

8 A. Did Kos decline?

9 Q. I'm sorry, I meant Searle. Did Searle --

10 A. Searle declined the Kos licensing opportunity
11 in Europe, yes.

12 Q. Did Searle ever make a response to Kos about
13 whether or not it wanted to pursue the Niaspan license?

14 A. I think we indicated to Mr. Patel and after the
15 meeting with Mr. Bell and also at the meeting with Mr.
16 Bell indicated by nonresponsiveness, in other words,
17 nonengagement in active discussions that we were not
18 going to pursue it.

19 Q. Approximately when did that occur?

20 MS. SHORES: Objection, the nonresponsiveness?

21 BY MS. BOKAT:

22 Q. You referred --

23 JUDGE CHAPPELL: To the previous question?

24 MS. SHORES: Well, I guess I'm objecting to the
25 current question as being vague given the previous

1 answer. I think he said that they indicated their lack
2 of interest by nonresponsiveness, and then she asked
3 when did that occur.

4 JUDGE CHAPPELL: I'll allow the first answer,
5 because he does get to a response at the end of his
6 answer, but I will sustain the objection for vagueness.
7 You'll need to rephrase the question, Ms. Bokat.

8 BY MS. BOKAT:

9 Q. Mr. Egan, was it at a meeting between Searle
10 and Kos that Searle indicated you weren't going to go
11 forward with a licensing opportunity?

12 A. We had a discussion at a meeting with I believe
13 his name was Bell, who was the CEO of Kos, at which he
14 indicated that we had to come to closure and gave bold
15 outlines of what he thought a deal would be. We
16 declined to pursue that, thanked him for the meeting,
17 and indicated, you know, that we were moving on.

18 At a subsequent communication with Mr. Patel,
19 they called back and said, well, gee, when are you
20 going to respond? And I said to Mr. Patel, we didn't
21 want to be as blunt as that, but frankly, we are not
22 going to pursue the opportunity further.

23 Even after that, Mr. Patel called on a couple
24 of occasions seeing if he could re-ignite our interest,
25 and we consistently over time said no, thank you.

1 Q. When did that meeting with Mr. Bell occur?

2 A. It was early in '98 or to the end of '97, to my
3 recollection. It was in New York.

4 Q. Did you personally make any comparison in your
5 mind of Niacor-SR and Niaspan?

6 MS. SHORES: Objection, beyond the scope of
7 proper rebuttal as to Schering, unless he's talking
8 about a comparison between the strategic fit that each
9 of those two products would have offered.

10 JUDGE CHAPPELL: Do you want to rephrase?

11 MS. BOKAT: Well, it's also rebuttal to Dr.
12 Kerr's testimony that was not limited to strategic fit.

13 MS. SHORES: Well, on that ground, I object on
14 the grounds of this fact witness is not an expert.

15 MR. CURRAN: Likewise, Your Honor.

16 JUDGE CHAPPELL: I'll sustain the objection.
17 He can tell us about strategic fit. So, you need to
18 re-ask it.

19 BY MS. BOKAT:

20 Q. Did you compare Niacor and Niaspan in terms of
21 strategic fit?

22 A. For our company, for a strategic fit, I
23 compared them, yes.

24 Q. What was the result of your comparison?

25 A. We did not think that Niacor was a strategic

1 fit at all, and Niaspan we thought might be a strategic
2 fit under the right commercial conditions.

3 Q. What would -- what were the right commercial
4 conditions?

5 A. If we could enter into a deal where we could
6 support the sales force to build the sales force to get
7 ready for the fibans, where we had realistic
8 expectations of profitable operations and detailing
9 that was consistent with our growth needs, not with the
10 expectations of the people at Kos.

11 Q. I'd like to go back, if I could, for a brief
12 minute to the discussions between Searle and
13 Upsher-Smith. After the meeting that you had with
14 Upsher-Smith, how much time elapsed before you
15 determined that you were not interested in a license
16 for Niacor-SR?

17 A. About 20 minutes.

18 Q. Did the slides that Upsher-Smith presented to
19 Searle play any role in your personal decision about
20 whether to proceed with a license on Niacor-SR?

21 A. As I stated before, based upon my confirming of
22 the slides and Jim Stolzenbach, and I believe it was
23 Jim Stolzenbach's opinion, his walking me through the
24 slides and what it meant, yes, they did play a role.

25 Q. What was your perception of what those slides

1 meant?

2 MS. SHORES: Objection, calls for hearsay if
3 he's going to relay what Mr. Stolzenbach's opinion was.

4 JUDGE CHAPPELL: Are these slides in evidence
5 already?

6 MS. BOKAT: Yes, Your Honor, they are in USX
7 538 that we discussed earlier in the day, and they had
8 been previously admitted as an Upsher-Smith exhibit.

9 MR. CURRAN: But, Your Honor, his perceptions
10 are a lay opinion.

11 JUDGE CHAPPELL: And I think the objection was
12 premature, Ms. Shores. I think she asked this witness
13 about his perception, right?

14 MS. SHORES: It's not the first time, Your
15 Honor, that I've been premature. I'll wait for another
16 question.

17 JUDGE CHAPPELL: So, I'll sustain the -- was
18 that an objection, Mr. Curran, or a comment? What --

19 MR. CURRAN: I was fully intending to make an
20 objection, Your Honor.

21 JUDGE CHAPPELL: Okay, let's tweak it a little
22 bit, then.

23 MR. CURRAN: Your Honor, the question calls for
24 this lay witness' perception of highly technical
25 clinical data in a report. He's already testified on

1 voir dire that it's beyond his competence to personally
2 analyze this stuff. Therefore, his perception is not
3 authorized under Rule 701 and is not relevant to this
4 proceeding.

5 JUDGE CHAPPELL: I'll overrule that as far as
6 his perception as far as when it entered into his
7 decision making, but his perception as far as it tries
8 to get an expert opinion in will not be allowed.

9 MR. CURRAN: Thank you, Your Honor.

10 JUDGE CHAPPELL: Go ahead.

11 Do you need the reporter to read it back?

12 MS. BOKAT: Yes, please.

13 (The record was read as follows:)

14 "QUESTION: What was your perception of what
15 those slides meant?"

16 THE WITNESS: My perception was that there was
17 increased toxicity risk with this dosage form compared
18 to immediate release dosages for niacin.

19 MS. BOKAT: Your Honor, I would like to go back
20 to a question I posed earlier. It's a question about
21 whether Mr. Egan believed Niacor-SR would be approved.
22 Earlier, there was an objection that he shouldn't be
23 allowed to testify about whether Niacor-SR was
24 approvable, but Mr. Audibert and Mr. Lauda, both of
25 whom were fact witnesses, testified that they assumed

1 Niacor-SR would be approved.

2 So, if this fact witness is not to be permitted
3 to answer the question, I think the testimony of Mr.
4 Audibert and Mr. Lauda should be struck.

5 JUDGE CHAPPELL: I think the respondents have
6 on the record agreed that they haven't attempted to
7 offer that opinion into evidence. Is that correct, Ms.
8 Shores?

9 MS. SHORES: That's correct, Your Honor.

10 JUDGE CHAPPELL: Mr. Curran, or is it Mr.
11 Gidley or --

12 MR. CURRAN: Well, I think I can speak on that,
13 and that is correct, Your Honor.

14 JUDGE CHAPPELL: With that, there's no harm,
15 then, Ms. Bokat. Is that right?

16 MS. BOKAT: But they offered fact witness
17 testimony to that point, and I just wanted to put the
18 similar question to this fact witness.

19 MS. SHORES: Your Honor, I think we had
20 stipulated that we're not offering expert testimony on
21 approvability. Ms. Bokat may have a point with respect
22 to fact -- fact witness testimony, and to that extent,
23 I will not on behalf of Schering object to Mr. Egan's
24 testimony in that regard. If he's offering expert
25 testimony, I do have an objection.

1 MR. CURRAN: That's correct, Your Honor. We
2 withdrew experts Knopp and Keenan. Your Honor ruled
3 that expert Pitt couldn't testify, and that obviated
4 the appearance of expert Davidson.

5 JUDGE CHAPPELL: So, I think after all that --

6 MS. SHORES: Your Honor, again -- excuse me, I
7 think I misstated something, and let me just clear it
8 up.

9 As to this particular witness, as established
10 through Mr. Curran's voir dire, I don't believe he has
11 the competence or scientific background to even offer
12 an opinion on approvability or -- as a fact witness.
13 Mr. Audibert, I submit, stands in a different footing.

14 JUDGE CHAPPELL: So then, after all that, what
15 we come down to is does he believe it would be approved
16 for what that's worth, since he's not an expert in that
17 area, and since we have some fact witness testimony on
18 that, you can ask him if he believed it would be
19 approved. I would rather know if whether the
20 approvability went into his decision making, but go
21 ahead.

22 BY MS. BOKAT:

23 Q. Did the approvability of Niacor-SR go -- play a
24 role in your decision with respect to pursuing a
25 license on Niacor-SR?

1 A. Yes.

2 Q. What role did it play?

3 A. It was central. If the product wasn't seen as
4 potentially approvable, we had no interest in it.

5 Q. Did you think Niacor-SR was potentially
6 approvable?

7 A. No.

8 MS. BOKAT: Could I have one minute, please,
9 Your Honor, to confer with my colleagues and then wrap
10 this up?

11 JUDGE CHAPPELL: Yes, you may.

12 MS. BOKAT: Thank you.

13 (Counsel conferring.)

14 MS. BOKAT: I have no further direct
15 examination, Your Honor.

16 JUDGE CHAPPELL: Cross exam?

17 MR. CURRAN: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MR. CURRAN:

20 Q. Mr. Egan, now, during your tenure at Searle,
21 the company received unsolicited licensing
22 opportunities in large numbers on a day-to-day basis,
23 correct?

24 A. That's right.

25 Q. In fact, you testified on direct that you

1 received literally hundreds of such opportunities a
2 year, correct?

3 A. Yes.

4 Q. You said there were 30, 40 or 50 a month,
5 right?

6 A. Some months, yes.

7 Q. Pardon?

8 A. Some months, yes.

9 Q. And you and your colleagues served as a screen,
10 correct?

11 A. We did.

12 Q. You said to winnow out the vast majority of
13 these licensing opportunities, correct?

14 A. Correct.

15 Q. Because you didn't want executives at Searle to
16 use up valuable time, correct?

17 A. Yes.

18 Q. Now, sir, because of that screen function, the
19 majority -- the vast majority of licensing
20 opportunities that were presented to Searle were not
21 given much of a response, correct?

22 A. I don't understand what you mean by "much of a
23 response."

24 Q. Well, most of the -- most of the licensing
25 opportunities presented to Searle didn't make the cut

1 even to have much of a response, correct?

2 A. Again, I don't know what you mean by "much of a
3 response." What do you mean?

4 Q. Much of a response from Searle to the person
5 proposing the licensing opportunity.

6 MS. BOKAT: Objection, vague.

7 JUDGE CHAPPELL: I think we've established
8 that. That's sustained. He doesn't understand your
9 question, Mr. Curran.

10 BY MR. CURRAN:

11 Q. Let me see if I can -- if I can help the
12 witness here.

13 JUDGE CHAPPELL: Are you going to try to fly
14 that ELMO on your own?

15 MR. CURRAN: I don't know, Your Honor.

16 BY MR. CURRAN:

17 Q. Sir -- I can fly this, Your Honor -- sir, at
18 your deposition you testified that, "most of the
19 licensing opportunities didn't make the cut even to
20 have much of a response," correct?

21 A. Right, in terms of much of a response in that
22 context. The response might have been a simple no
23 interest, no, thank you, not a reason for no, thank
24 you, but simply no, thank you.

25 Q. Very good, thank you. And again, that was for

1 the vast majority of licensing opportunities, correct?

2 A. Of unsolicited licensing opportunities, that
3 was the majority, yes.

4 Q. Out of the hundreds you received a year, the
5 vast majority --

6 A. Correct, absolutely.

7 Q. -- get a thanks, but no thanks?

8 A. Exactly.

9 JUDGE CHAPPELL: Hang on, sir, one at a time.
10 This lady's trying to take a record. You're both
11 talking at the same time.

12 THE WITNESS: Oh, pardon me.

13 MR. CURRAN: Thank you, Your Honor.

14 JUDGE CHAPPELL: Whether it's you or Mr.
15 Curran, just one at a time, please.

16 MR. CURRAN: Understood.

17 THE REPORTER: Thank you.

18 BY MR. CURRAN:

19 Q. Now, sir, if a licensing opportunity was worthy
20 of a response, you would usually ask for
21 nonconfidential information first, correct?

22 A. Yes.

23 Q. And then a nonconfidential meeting, correct?

24 A. Yes.

25 Q. And then, if you thought the opportunity worthy

1 of additional analysis, you would suggest a
2 confidential agreement and a full analysis, correct?

3 A. Yes.

4 Q. Now, sir, you were not involved in the
5 initiation of the discussions between Upsher-Smith and
6 Searle, correct?

7 A. No, I don't think so.

8 Q. That was Mary Schwab and her group, right?

9 A. That's my recollection.

10 Q. They became aware of the licensing -- of the
11 Niacor-SR opportunity and invited Upsher-Smith to meet,
12 correct?

13 A. Yes.

14 Q. So, Upsher-Smith and Niacor-SR made it through
15 the initial screening process, right?

16 A. Yes.

17 Q. It was deemed worthy, correct?

18 A. Yes.

19 Q. And sir, Mary Schwab and her colleagues invited
20 Upsher-Smith in for a confidential discussion, correct?

21 A. I believe so.

22 Q. They skipped right over the nonconfidential
23 stage, correct?

24 A. I don't know that.

25 Q. Now, sir, you testified on direct that you

1 believed that there was a confidentiality agreement
2 executed between Upsher-Smith --

3 A. I think that was --

4 Q. -- and Schering-Plough, correct?

5 A. -- I think that was the case, right.

6 Q. And you're aware --

7 A. Wait a minute, Upsher-Smith and Schering-Plough
8 or Upsher-Smith and Searle?

9 Q. Very good, let me clarify.

10 Sir, you testified on direct that you believed
11 there was a confidentiality agreement between
12 Upsher-Smith and Searle, correct?

13 A. I believe so, yes.

14 Q. And you're aware of one meeting that took place
15 between the companies, correct?

16 A. Yes.

17 Q. And your understanding was that that meeting
18 was subject to a confidentiality agreement, correct?

19 A. Yes, that's my current understanding.

20 Q. So, necessarily, the meeting that took place,
21 the one and only meeting that took place between
22 Upsher-Smith and Searle, was a confidential meeting
23 that took place without a prior nonconfidential
24 meeting.

25 A. I don't know that that was the only meeting.

1 It came in through Mary Schwab's group. They may have
2 had prior nonconfidential meetings. I do not know.

3 Q. Okay. You weren't in the loop on that,
4 correct?

5 A. That's correct.

6 Q. Now, sir, Mary Schwab specialized in Europe,
7 right?

8 A. Yes.

9 Q. And her responsibilities were European product
10 oriented, correct?

11 A. European market oriented, yes, not product but
12 market, yes.

13 Q. Sir, she tended to be more oriented toward
14 product opportunities that were either on the market or
15 near market, correct?

16 A. That's correct.

17 Q. And Niacor-SR was considered near market,
18 correct?

19 A. Advanced stage of testing, I guess, yes.

20 Q. That's near market, correct?

21 A. No, advanced stage of testing.

22 Q. Sir, in your deposition, you gave the following
23 testimony, didn't you:

24 "QUESTION: How did you get into discussions
25 with Upsher?

1 "ANSWER: I think Mary Schwab was also looking
2 at Kos, she was the person who was specialized in
3 Europe. My responsibilities were global cardiovascular
4 licensing and hers were more European product oriented.
5 She tended to be more product oriented towards product
6 opportunities that were either on the market which you
7 could buy out from somebody else or something that was
8 called near market and the Upsher product was
9 considered near market."

10 A. Where does it say -- right, I would say in
11 that --

12 Q. Did you give that testimony?

13 A. I did.

14 Q. And so you testified that the Upsher product
15 was considered near market, correct?

16 A. Wait, put that back, please.

17 Q. I'll give it to you.

18 JUDGE CHAPPELL: Is this monitor not working?

19 THE WITNESS: No, he just took it off.

20 JUDGE CHAPPELL: How about that one right
21 there, sir, right beside you? That might be easier to
22 read.

23 MR. CURRAN: It would be a lot easier.

24 THE WITNESS: I think it was Mary who
25 considered the Upsher product near market.

1 BY MR. CURRAN:

2 Q. Well, my question, the Upsher product was
3 considered near market, correct?

4 A. I'm sorry, in that setting, yes, it was
5 considered near market by Mary, yes.

6 Q. And that was your testimony in the deposition,
7 correct?

8 A. Correct.

9 Q. Now, sir, Mary Schwab was in business
10 development reporting to the European desk, correct?

11 A. Correct.

12 Q. You were not her boss, correct?

13 A. No.

14 Q. Her boss was Holly Vene, correct?

15 A. Holly Vene, right.

16 Q. Vene, is that how you pronounce it?

17 A. Yes.

18 Q. V E N E.

19 A. Yes, Holly Vene.

20 Q. And Holly Vene was a director for Europe,
21 correct?

22 A. That's correct.

23 Q. She was at a level equivalent to yours,
24 correct?

25 A. That's right.

1 Q. So, Ms. Schwab set up the meeting, correct?

2 A. That's right.

3 Q. And the meeting took place on May 28th, 1997,
4 correct?

5 A. That's what the documents suggest, and that's I
6 guess the best of my recollection now.

7 Q. And it took place at Searle's offices in
8 Skokie, Illinois, right?

9 A. Right.

10 Q. In fact, you referred to the building and
11 the --

12 A. Sure.

13 Q. What building was that again?

14 A. Tower 2.

15 Q. Tower 2.

16 A. 7th floor.

17 Q. 7th floor. In a conference room?

18 A. Right across from Mary's office, Mary Schwab's
19 office.

20 Q. And that's right across from the European
21 regional offices, correct?

22 A. That's correct.

23 Q. Sir, Upsher-Smith indicated that they wanted to
24 maintain the rights to Niacor-SR in the United States,
25 correct?

1 A. That was one of their statements in the
2 meeting, that's right.

3 Q. And sir, Searle needed a product in the
4 hypolipidemia market that would have been a logical
5 entry for the sales force, correct?

6 A. Hyperlipidemia market, yes.

7 Q. Sir, Searle's European sales force needed a
8 product to promote to get ready for a IIb/IIIA
9 inhibitor that Searle had in development, correct?

10 A. Both Europe and the U.S. did, that's correct,
11 yes.

12 Q. And in order to support the cost of building a
13 cardiovascular sales force in Europe, correct?

14 A. In Europe and the United States both, that was
15 the pretext of the meeting. That's why I was also
16 included as a global consideration of the opportunity,
17 yes.

18 Q. But again, you understood that Upsher-Smith was
19 marketing this product for Europe, correct?

20 A. Not -- no, you -- Europe it was available.
21 Upsher-Smith came in with a presumption that they would
22 be marketing it in the United States, as I had
23 understood.

24 Q. Okay.

25 A. We wanted to market it both in the United

1 States and in Europe in some fashion that would be
2 collaborative.

3 Q. That's your best recollection of why
4 Upsher-Smith was meeting with Searle?

5 A. Yes.

6 MR. CURRAN: Your Honor, may I approach?

7 JUDGE CHAPPELL: Yes, you may.

8 MR. CURRAN: Your Honor, I'm handing out a
9 document that has not been used in this proceeding yet,
10 but I have put a marker on it indicating USX 1634.

11 (USX Exhibit Number 1634 was marked for
12 identification.)

13 BY MR. CURRAN:

14 Q. Sir, I'd like to direct your attention to the
15 first sentence in this letter. Let me first ask, have
16 you seen this letter before?

17 A. I don't believe I have.

18 Q. You weren't in the loop in connection with this
19 letter, correct?

20 A. No, I don't think so.

21 Q. It's not to you, is it?

22 A. It is not to me.

23 Q. It's not from you either, is it?

24 A. It is not from me.

25 Q. And it's not copied to you either, is it?

1 A. No, it is not.

2 Q. Sir, this is a letter from Mary Schwab to David
3 Pettit, correct?

4 A. That's what it appears to be, yes.

5 Q. Who's David Pettit?

6 A. He's apparently at Moreton Marketing Limited in
7 Oxfordshire England.

8 Q. Do you get that from the document that's in
9 front of you?

10 A. That's why I said it appears to be, yes.

11 Q. Other than what you see right here, what's your
12 knowledge as to what Mr. Pettit's profession is?

13 A. I have no knowledge.

14 Q. But you know -- this is the Mary Schwab we were
15 discussing, correct?

16 A. I assume it's the Mary Schwab. It's her title
17 and around about the time she was in the job, yes.

18 Q. And this is Searle letterhead, correct?

19 A. It is.

20 MR. CURRAN: Your Honor, I move for the
21 admission of USX 1634.

22 MS. SHORES: No objection, Your Honor.

23 MS. BOKAT: No objection.

24 BY MR. CURRAN:

25 Q. Now, Mr. Egan, do you see the first sentence of

1 this letter?

2 A. I do.

3 JUDGE CHAPPELL: Mr. Curran, would you like a
4 ruling?

5 MR. CURRAN: Yes, I'm sorry, Your Honor.

6 JUDGE CHAPPELL: USX 1634 is admitted.

7 (USX Exhibit Number 1634 was admitted into
8 evidence.)

9 MS. BOKAT: Just one clarification, could we
10 get a copy at some point with an exhibit number on it?

11 MR. CURRAN: Yes.

12 MS. BOKAT: Thank you.

13 BY MR. CURRAN:

14 Q. Sir, do you see the first sentence of USX 1634?

15 A. I do.

16 Q. Do you see where it says, "Mr. Keith Quick
17 forwarded your letter regarding the Niacor-SR European
18 licensing opportunity to my attention"?

19 A. That's right.

20 Q. Have I read that correctly?

21 A. Yes, you have.

22 Q. Okay. Now, you said a moment ago your
23 understanding was that Upsher-Smith was shopping
24 Niacor-SR for the U.S. market principally.

25 A. No, no, perhaps I didn't speak correctly,

1 perhaps we spoke past each other. I believe that
2 Upsher-Smith wanted a partner in Europe. We had a
3 priority for a partnership both in Europe and the
4 United States. Upsher-Smith's posture going into the
5 meeting was that they were not inclined to talk about
6 the United States but that they wanted a partner in
7 Europe. It was our priority and it was our feeling
8 that if the product was attractive, we would try to do
9 a deal that would be both Europe and U.S. related,
10 because we had a full-scale professional sales force,
11 Upsher-Smith was relatively small, and the same
12 strategy that we had been thinking about for Kos would
13 have applied in the Upsher-Smith setting.

14 Q. Good, thank you.

15 Now, sir, your recollection of the actual
16 meeting with Upsher-Smith is vague, correct?

17 A. Aspects of it are vague, yes.

18 Q. Well, your recollection of the meeting -- the
19 details of the meeting are vague, correct?

20 A. All of the details of the meeting?

21 Q. Yeah.

22 A. No, I wouldn't say that all the details of the
23 meeting are vague, no.

24 Q. Well, all of the details you don't remember,
25 correct?

1 MS. BOKAT: Objection, I don't think there's
2 been any foundation that this witness remembers nothing
3 from the meeting.

4 MR. CURRAN: I'm asking.

5 THE WITNESS: I remember things from the
6 meeting.

7 JUDGE CHAPPELL: Hang on, sir. We have an
8 objection.

9 THE WITNESS: Oh, pardon me, pardon me.

10 JUDGE CHAPPELL: You're learning. You don't
11 answer when they stand, but wait for a ruling, okay?

12 Mr. Curran, I'm asking, is that a rephrasing of
13 your question?

14 MR. CURRAN: I'll tell you what, Your Honor, I
15 will rephrase.

16 JUDGE CHAPPELL: And then, Ms. Bokat, do you
17 withdraw the objection?

18 MS. BOKAT: Yes, Your Honor.

19 JUDGE CHAPPELL: Until you hear the rephrasing?

20 MS. BOKAT: Yes, but then that would be a new
21 objection. I'll withdraw my last one.

22 JUDGE CHAPPELL: Thank you. Good point.

23 BY MR. CURRAN:

24 Q. Sir, you don't recall the names of the
25 Upsher-Smith people who attended the meeting, do you?

1 A. No, I do not.

2 Q. You don't remember what their credentials were,
3 do you?

4 A. No, I do not.

5 Q. And that's because of the passage of time,
6 correct?

7 A. In part, yes.

8 Q. Sir, do you still have the document -- the
9 thick document there that Ms. Bokat showed you with the
10 black cover?

11 A. Yes, I do.

12 Q. I'd like to refer your attention to the first
13 page of that, the first interior page, yes. Right,
14 that's the agenda for the meeting, correct?

15 A. Yes.

16 Q. Okay. Sir, you remember the introduction of
17 that meeting only vaguely, correct?

18 A. I remember the introduction of people vaguely,
19 yes, their names and their titles vaguely.

20 Q. And sir, you remember the overview of
21 Upsher-Smith that Vickie O'Neill presented only
22 vaguely, correct?

23 A. I remember some of the -- the profile of it,
24 its size, you know, what it was doing, what its burn
25 rate was, just in general categories for where they fit

1 in the industry. I was kind of curious about them,
2 because I hadn't heard anything about them. I do
3 remember that.

4 Q. Sir, in your deposition, you testified as
5 follows:

6 "QUESTION: Sir, do you remember the overview
7 of Upsher-Smith Laboratories that Vickie O'Neill
8 presented?

9 "ANSWER: Vaguely."

10 That was your testimony, correct?

11 A. Right. But aspects --

12 Q. Sir --

13 A. -- aspects of it I did remember.

14 Q. Okay. Sir, your recollection of Vickie
15 O'Neill's discussion of the Niacor-SR formulation and
16 patents is vague, correct?

17 MS. BOKAT: Objection, asked and answered.

18 MR. CURRAN: Different question, I'm talking
19 about the -- a different question, Your Honor. This
20 one's addressing the Niacor-SR formulation and patents.

21 JUDGE CHAPPELL: I'll allow it. Go ahead.

22 Do you need Susanne to read the question back?

23 MR. CURRAN: I think I can restate it, Your
24 Honor, thank you.

25 JUDGE CHAPPELL: Okay.

1 BY MR. CURRAN:

2 Q. Sir, you recall only vaguely Vickie O'Neill's
3 discussion of the Niacor-SR formulation and patents,
4 correct?

5 A. I have a vague recollection that they had a
6 patent covered sustained release formulation. That's
7 my vague recollection, yes.

8 Q. Okay. And sir, you remember only vaguely Ms.
9 Lori Freese's discussion of the treatment strategies
10 for hypercholesterolemia, correct?

11 A. I remember that she talked about niacin
12 sustained release being an element of a treatment
13 strategy for hypercholesterolemia. All of the
14 particulars of it I do not necessarily recall, no.

15 Q. Okay. So, you don't remember all of the
16 particulars of that meeting, correct?

17 A. That is correct.

18 Q. But you were at the meeting, correct?

19 A. I remember that.

20 Q. So, at one point you remembered all the
21 particulars of the meeting, correct?

22 A. I tried to focus on the things that were
23 critical to my job and my job function at the meeting,
24 and by and large, on the things that were critical to
25 my job I have a pretty good memory.

1 Q. I am going to ask if a particular document
2 refreshes your recollection at all of the details of
3 the meeting.

4 May I approach, Your Honor?

5 JUDGE CHAPPELL: Yes, you may.

6 THE WITNESS: Can you get the focus on that a
7 little bit better? I still can't read it.

8 BY MR. CURRAN:

9 Q. I'll give you a copy, sir, and then I'll focus
10 it better for you as well.

11 A. Okay, thanks.

12 Q. Sir, this appears to be a memorandum from
13 Vickie O'Neill of Upsher-Smith Laboratories dated June
14 4, 1997, correct?

15 A. That's what it purports to be, right.

16 Q. Sir, I want to direct your attention to the
17 final bullet point under Highlights. Sir, do you see
18 where it says, "Mark Halvorsen, Lori Freese, Drs. Brown
19 and Drobnes and myself met with Searle on May 28, 1997
20 and presented the Niacor-SR clinical data. They
21 expressed interest in both European licensing and U.S.
22 co-promotion possibilities."

23 A. I see those words.

24 Q. Do you see that?

25 Does that refresh your recollection at all as

1 to the details of this meeting you attended?

2 A. It doesn't change my recollection of the
3 meeting at all.

4 Q. Okay. Now, sir, you testified earlier that Mr.
5 Stolzenbach --

6 A. James Stolzenbach.

7 Q. -- James Stolzenbach provided you with --
8 raised some concerns about Niacor-SR's liver toxicity,
9 correct?

10 A. That's what I believe occurred. I believe it
11 was Jim Stolzenbach.

12 Q. But you're not really sure if he was even at
13 the meeting, correct?

14 A. Whether it was Jim specifically, although
15 that's my recollection, it was Jim, or somebody else
16 from the preclinical group, which I still believe is
17 Jim, someone from project management and toxicity, and
18 I think it was Jim in any event, advised me right after
19 that meeting, and it is the best of my recollection
20 that it was Jim, but I can't -- you know, if there's a
21 conflicting document, whether it was Brian or Jim, but
22 I'm pretty sure it was Jim, advised me right after that
23 meeting.

24 Q. Let me ask that question again.

25 You don't exactly remember whether Mr.

1 Stolzenbach was at the meeting or not, correct?

2 A. Whether it was specifically Jim Stolzenbach or
3 not, I do not recall. It is the best of my
4 recollection that he would have been and I do believe
5 in my recollection it was he. Am I subject to
6 contradiction by a written record? Perhaps.

7 Q. So, it was either Jim Stolzenbach or somebody
8 else who raised concerns about Niacor-SR's liver
9 toxicity, correct?

10 A. My recollection is that immediately after the
11 meeting Jim Stolzenbach, and I believe it was Jim
12 Stolzenbach, met outside of those offices and reviewed
13 the data that was presented. Jim said, I don't know
14 how they can go forward, they seem to have more liver
15 toxicity with their dosage form than the immediate
16 release form. We can't go after this drug. That is a
17 paraphrase.

18 Q. And it was based upon that statement that -- at
19 least in part based upon that statement -- that you
20 concluded that Niacor-SR was not a good licensing
21 opportunity for Searle, correct?

22 A. That's correct.

23 Q. So, you relied upon the views of either Mr.
24 Stolzenbach or someone else, correct?

25 A. Yes.

1 Q. In reaching that decision that you made,
2 correct?

3 A. That's right.

4 Q. And in fact, sir, Mr. Stolzenbach or whoever it
5 was you spoke to would be in the best position to
6 testify specifically about the concerns relating to
7 liver toxicity, correct?

8 A. I think the people that ran the trials would be
9 in the best position to testify about the concerns
10 about liver toxicity.

11 Q. Very good. Now, sir, you also testified that
12 you looked up public information on niacin, correct?

13 A. Yes.

14 Q. You personally did that, right?

15 A. Yes, I did.

16 Q. And the information that you looked up did not
17 relate to Upsher-Smith's Niacor-SR, correct?

18 A. It wasn't registered, so it couldn't have been.

19 Q. Now, sir, you testified earlier that after the
20 May 28th, 1997 meeting, you think Searle communicated
21 with Upsher-Smith, correct?

22 A. I believe they communicated with Upsher-Smith,
23 either I or Mary Schwab told them we were not further
24 interested.

25 Q. Sir, isn't it a fact that you don't know for a

1 fact whether there was any such communication?

2 MS. BOKAT: Objection, I think that question
3 was confusing.

4 MR. CURRAN: I'll ask it again. I'll withdraw
5 that question, Your Honor, obviate the objection.

6 JUDGE CHAPPELL: Thank you.

7 BY MR. CURRAN:

8 Q. Sir, you don't know for a fact that there was
9 any such post-meeting communication from Searle to
10 Upsher-Smith, do you?

11 A. It's my recollection, as between myself and
12 Mary Schwab, a communication saying no, thank you was
13 made to Upsher-Smith.

14 Q. Okay. Sir, I want to refer your attention to
15 your monitor there again.

16 A. Okay.

17 Q. Can you read that, sir? Can you, sir?

18 A. Yeah, I can, yeah.

19 Q. Okay, I'll read it. Sir, at your deposition,
20 you gave the following testimony.

21 A. Right.

22 Q. "QUESTION: Sir, at the conclusion of this
23 meeting or afterwards, your earlier testimony was that
24 you believed that Ms. Schwab communicated with
25 Upsher-Smith.

1 "ANSWER: I think it was decided that she would
2 talk with them because she was the person that
3 facilitated their coming in.

4 "QUESTION: Do you recall how she
5 communicated --

6 "ANSWER: No, I don't.

7 "QUESTION: -- with Upsher-Smith?

8 "ANSWER: I don't.

9 "QUESTION: Do you know --

10 "ANSWER: I may have communicated with them, I
11 don't know. I mean, she may have asked me, I may have
12 asked her, but it was going to be a relatively short
13 communication with them.

14 "QUESTION: Okay. But you're not sure whether
15 you or she or neither or both communicated with
16 Upsher-Smith, correct?

17 "ANSWER: Who did the actual final
18 communications with them, I'm not sure, correct.

19 "QUESTION: Well, my question went a little bit
20 further than that. You don't know for a fact whether
21 there was a communication from Searle to Upsher-Smith
22 after this.

23 "ANSWER: I have an expectation there was a
24 communication with them. I do not know for a fact that
25 there was one, that's correct."

1 You gave that testimony at your deposition,
2 correct?

3 A. Yes, I gave that testimony at the deposition.

4 Q. Okay. Sir, niacin is a drug used in the
5 treatment of hyperlipidemia, correct?

6 A. Yes, it is, atherosclerosis and hyperlipidemia,
7 correct.

8 Q. That's a huge market, correct?

9 A. It's a very large one.

10 Q. One with in excess of \$10 billion a year in
11 sales, correct?

12 A. Globally, yeah.

13 Q. And even a small piece of that pie is a
14 substantial opportunity, correct?

15 A. That's correct.

16 Q. Sir, in 1997, evaluating niacin was a project
17 priority for Searle, correct?

18 A. It was a priority, right.

19 Q. It was a priority to look at, correct?

20 A. Correct.

21 Q. It was one of those things that strategically
22 Searle thought it was important to go after, correct?

23 A. As a matter of strategy, it was an important
24 thing to evaluate, yes.

25 Q. In fact, sir, Searle itself was trying to

1 develop its own niacin analog during this period,
2 correct?

3 A. That's right.

4 Q. And this interest in niacin was one of the
5 reasons Searle met with Upsher-Smith and Kos, correct?

6 A. That's correct.

7 Q. Now, sir, you've done out-licensing yourself,
8 haven't you?

9 A. I have.

10 Q. And when you've done that, you've been turned
11 down sometimes, correct?

12 A. A lot of times.

13 Q. A lot. And you've had the experience where you
14 were trying to out-license a particular product, and
15 someone says, no, and then the next person says yes,
16 correct?

17 A. I've had that experience, yes.

18 Q. It happens that way sometimes, correct?

19 A. Sometimes it does.

20 Q. That's why salesmen keep at it, right?

21 A. Yes.

22 Q. And that's because reasonable people can differ
23 on licensing opportunities, correct?

24 A. On some issues, people can reasonably differ.

25 Q. And companies in different situations may have

1 a different view of things, correct?

2 A. That's correct.

3 Q. Or the people presenting the licensing
4 opportunity might make a better presentation on one day
5 than the next, correct?

6 A. Absolutely right.

7 Q. And you know this from personal experience,
8 correct?

9 A. Oh, yes.

10 Q. Now, sir, not every experienced licensing
11 executive will reach the same decision on the same
12 issue all the time, correct?

13 A. Sure, on -- on the vast spectrum of
14 opportunities, yeah, they may have different opinions.

15 Q. Sir, some people may value a licensing
16 opportunity different from others, correct?

17 A. That's right.

18 Q. In part, differences can be attributed to
19 subjective criteria, correct?

20 A. Yes.

21 Q. Or to a company's specific commercial needs,
22 correct?

23 A. Yes.

24 Q. Now, sir, in your career, there have been
25 occasions where you passed on a licensing opportunity

1 that another company then accepted, correct?

2 A. Yes.

3 Q. And there may have been occasions where others
4 have passed on a licensing opportunity that you then
5 accepted, correct?

6 A. Yes.

7 Q. In fact, sometimes, sir, a lot of people turn
8 down a licensing opportunity, but then the product in
9 question goes on to be a success for someone else,
10 correct?

11 A. That's right.

12 Q. And sir, there are situations where a variety
13 of big pharmaceutical companies passed on a licensing
14 opportunity and then it became a success, correct?

15 A. That's right.

16 Q. Sir, sometimes the best tutored minds in any
17 discipline can be wrong, correct?

18 A. Right.

19 Q. And sir, sometimes it happens the other way
20 around, where a pharmaceutical company licenses in a
21 product with high hopes, and then the product bombs,
22 correct?

23 A. There's risk in drug development, no question.
24 Yes, you're right.

25 Q. That happens a lot, correct?

1 A. It happens occasionally. I wouldn't say a lot.
2 I'd say, you know, it's -- it's the rare case rather
3 than the rule.

4 Q. Sir, in your deposition, you gave the following
5 testimony, did you not?

6 A. Um-hum.

7 Q. "QUESTION: Let's consider the flip side, a
8 situation where big pharma or some other pharmaceutical
9 company licensed in a product that appeared at one time
10 to be a blockbuster, a sure thing --

11 "ANSWER: And it bombed.

12 "QUESTION: -- and it bombed.

13 "ANSWER: It happens all the time."

14 Did you give that testimony at your deposition?

15 A. Yes. "Happens all the time" means it does
16 happen on occasion. That doesn't mean that it most
17 often does occur. You're talking about percentages
18 here. I believe your earlier statement was something
19 to the effect that it's common, it's frequent. I think
20 the word you put in earlier was "common," wasn't it?

21 Q. No, I asked if it happens all the time, and
22 that was your deposition testimony, correct?

23 A. In the deposition, that's what you asked. I'm
24 talking about your question earlier which you said was
25 it common.

1 Q. So, is it your position that it happens all the
2 time but it's not common?

3 A. It happens upon occasion. It is not
4 necessarily the common case. It's a -- it's -- in
5 terms of the general probability of it happening, it's
6 relatively a low probability that it happens where you
7 in-license something and it bombs. People are
8 presumptively doing good due diligence, and they only
9 spend their money on a product that's going to work,
10 and yeah, by and large, they only in-license things
11 that don't bomb, but yes, upon occasion, all the time
12 perhaps, there are drugs that do bomb, but, you know,
13 there are notable exceptions to the rule, not the rule.
14 You don't go out there to do licensing deals on things
15 that are going to bomb, and if you've done your job
16 right, it's rare that it happens.

17 Q. All right, let's talk about Searle's
18 experience. You referred before to this IIb --

19 A. IIb/IIIA.

20 Q. Explain again for Judge Chappell what that
21 product was.

22 A. The IIb/IIIA product is a product that
23 antagonizes the final common pathway of platelet
24 aggregation, and it's an orally bioavailable drug and
25 if successful would block myocardial infarctions and

1 cerebral infarctions or strokes.

2 Q. And sir, Searle invested \$270 million in that
3 product, correct?

4 A. That -- two of those products, orbofiban and
5 xemlofiban, that's correct.

6 Q. \$270 million, correct?

7 A. That's correct.

8 Q. And it was a phase III product, correct?

9 A. It went through phase III testing, that's
10 right.

11 Q. But never got approved, did it?

12 A. No, it failed.

13 Q. Never went to market, did it?

14 A. Never went to market.

15 Q. And Searle abandoned the project, correct?

16 A. Yes, it did.

17 Q. After \$270 million in expenses.

18 A. That's right.

19 Q. Those were sunk costs, correct?

20 A. As sunk as you can get, yeah.

21 Q. So, they gave up the product at that point.

22 A. The data didn't work, that's right.

23 Q. Sir, Searle's scientists found the Kos product
24 to be an attractive product, correct?

25 A. Potentially attractive, not absolutely

1 attractive.

2 Q. Sir, at your deposition, you gave the following
3 testimony:

4 "QUESTION: What was the conclusion of Searle's
5 scientific people about the Kos product?

6 "ANSWER: It was an attractive product.
7 Scientifically it seemed to offer an improved
8 therapeutic index."

9 Was that your testimony at your deposition?

10 A. Right. Yes, it is.

11 Q. Now, sir, that conclusion reached by the Kos
12 scientific people was based on clinical data from Kos,
13 correct?

14 A. Wait a minute, that conclusion based on -- by
15 the Searle people, not by the Kos people.

16 Q. Thank you very much.

17 That conclusion of the Searle scientific people
18 was based on Kos' clinical data, correct?

19 A. That's right.

20 Q. Okay. So, they liked Kos' clinical data, but
21 at least Mr. Stolzenbach wasn't impressed by
22 Niacor-SR's data, correct?

23 A. That's correct.

24 Q. Okay. Now, sir, Mr. Stolzenbach didn't know
25 the protocols underlying Niacor-SR's clinical studies,

1 correct?

2 A. Incorrect.

3 Q. He wasn't given the protocols at the May 28th,
4 1997 meeting, was he?

5 A. May I refer to --

6 Q. You may.

7 A. I think there's a protocol synopsis if you look
8 at what's been marked for identification here as 11581.
9 There's a start of -- well, there's several protocol
10 synopses that have been given out. So, I guess not the
11 entire protocol, but the synopses he certainly was
12 provided with, sure.

13 Q. Sure. So, Mr. Stolzenbach did not have
14 complete information on Niacor-SR's protocols, correct?

15 A. He had a synopsis of their protocols to make
16 his judgment, yes.

17 Q. But not the complete protocols, correct?

18 A. A sufficient amount of the protocol in terms of
19 the synopsis in his view and in mine to make an
20 informed judgment he had.

21 JUDGE CHAPPELL: Hang on, Mr. Curran. It's
22 past 2:30. Do the parties want to take a break or
23 press on?

24 MS. BOKAT: Could we maybe ask the witness if
25 he has a pleasure about that, too?

1 JUDGE CHAPPELL: I was going to get to him
2 next. All in due time.

3 MS. SHORES: I am getting kind of hungry, but
4 it's -- it's up to everybody else.

5 MR. CURRAN: It's more in Ms. Shores' interest,
6 Your Honor. I think we should take a lunch break.

7 JUDGE CHAPPELL: Okay, do you want to take an
8 hour or less than an hour?

9 MR. CURRAN: I defer to others.

10 MS. SHORES: Less is fine. Forty-five minutes
11 is fine with me, Your Honor.

12 JUDGE CHAPPELL: Why don't we break until 3:15.

13 MS. SHORES: That's fine.

14 JUDGE CHAPPELL: We're in recess.

15 (Whereupon, at 2:35 p.m., a lunch recess was
16 taken.)

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 (3:20 p.m.)

3 JUDGE CHAPPELL: Go ahead, Mr. Curran.

4 MR. CURRAN: Your Honor, I have no further
5 questions for this witness.

6 JUDGE CHAPPELL: We should take breaks more
7 often maybe.

8 MR. CURRAN: Either that or you were reading my
9 mind.

10 JUDGE CHAPPELL: That's scary. I don't know --
11 so, Ms. Shores, are you going to be handling the cross
12 for Schering?

13 MS. SHORES: I am, Your Honor.

14 JUDGE CHAPPELL: And do you have some?

15 MS. SHORES: I do have some.

16 JUDGE CHAPPELL: Go ahead.

17 MS. SHORES: Although not many.

18 Your Honor, may I approach?

19 JUDGE CHAPPELL: Yes, you may.

20 MS. SHORES: And no one should be alarmed by
21 the fact that I have a binder.

22 JUDGE CHAPPELL: I'm alarmed that it's a small
23 binder.

24 MS. SHORES: I can get a bigger one.

25 CROSS EXAMINATION

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 BY MS. SHORES:

2 Q. Good afternoon, Mr. Egan.

3 A. Good afternoon.

4 Q. Mr. Egan, Searle did net present value
5 calculations when evaluating in-licensing
6 opportunities, did it not?

7 A. Yes.

8 Q. And those net present value calculations were
9 based on anticipated cash flows, right?

10 A. That's right, discounted cash flows.

11 Q. It's pretty typical of pharmaceutical companies
12 to do net present value calculations when evaluating
13 licensing deals, is it not?

14 A. Yes.

15 Q. Mr. Egan, when you were at Searle, the length
16 of time it took to evaluate a licensing opportunity
17 depended on the opportunity, correct?

18 A. Correct.

19 Q. And you may have covered this with Mr. Curran,
20 but it wouldn't be unusual in your experience for one
21 company to consider a licensing opportunity to be more
22 valuable than another company, right?

23 A. Reasonable people may differ on reasonable
24 issues, yes, it is possible.

25 Q. Now, in your experience in considering

1 in-licensing opportunities or out-licensing for that
2 matter, is it true that the parties don't really engage
3 in substantive discussions until after a
4 confidentiality agreement is signed?

5 A. Are you talking about my experience or my, you
6 know, expert opinion about the field or --

7 Q. Oh, just your experience, sir.

8 A. Okay.

9 Q. With all of your experience, with all the 40
10 licenses or however many you said there were.

11 A. Sure. In my experience typically you have a
12 confidentiality agreement before critical discussion
13 issues are reached on -- in an earnest fashion, yes.

14 Q. If you could turn in your binder to CX 522.

15 A. Um-hum.

16 Q. Do you have that, sir?

17 A. I do.

18 Q. Can you identify this document?

19 A. Yes, I can.

20 Q. What is it?

21 A. That's a confidentiality agreement between Kos
22 Pharmaceuticals and G. D. Searle.

23 MS. SHORES: Your Honor, I would move into
24 evidence CX 522.

25 MS. BOKAT: No objection.

1 MR. CURRAN: No objection.

2 BY MS. SHORES:

3 Q. And sir, based on the date of this document --

4 JUDGE CHAPPELL: Ms. Shores?

5 MS. SHORES: I promised myself I wouldn't do
6 that. I apologize, Your Honor.

7 JUDGE CHAPPELL: It seems to be catching.

8 MS. SHORES: We're all over-eager.

9 JUDGE CHAPPELL: CX 522 is admitted.

10 (Commission Exhibit Number 522 was admitted
11 into evidence.)

12 BY MS. SHORES:

13 Q. And based on the date of CX 522, it's fair to
14 say, is it not, that Searle and Kos didn't enter into
15 substantive discussions until after October 6th. Is
16 that right?

17 A. In this case, I wouldn't say that. As I say,
18 you know, these are general rules. They are not always
19 hard and fast, and Kos were the people that, you know,
20 we had approached earlier, and frankly, all they had
21 was a -- was a formulation change, so it wasn't
22 radically different technology that was going to have a
23 radically different outcome, and they were already
24 registered. I mean, their data was there.

25 I think the confidential disclosure agreement

1 was probably more related for the sake of commercial
2 negotiations; in other words, the numbers back and
3 forth. I think a lot of the other stuff that you'd
4 normally consider to be confidential, like stuff that
5 was in the clinical trial or patent strategy or
6 competitive intelligence, was pretty much known.

7 Q. Okay.

8 A. And I think we probably got around to this late
9 in the piece. I think that's probably more accurate.

10 Q. Okay, but Kos and Searle didn't enter into
11 discussions about the commercial aspects of the deal
12 until after October, right?

13 A. Well, we were signaling each other back and
14 forth earlier to that over an extended period of time.
15 I think this was a case probably where the CDA caught
16 up to the discussions rather than the CDA preceded the
17 discussions.

18 Q. Okay, well --

19 A. And frankly, from our perspective, because it
20 was them giving us the information, we weren't in a
21 real hurry to get it necessarily. It was mainly to
22 help them, not us.

23 Q. Now, the meetings that you talked about and the
24 discussions that you talked about in your direct
25 examination, those took place after October, did they

1 not?

2 A. Not all of them, no.

3 Q. Well, if you could turn to CX 524.

4 A. Right.

5 Q. All right, before you get there, let me ask you
6 this --

7 A. 524? Pardon me, go ahead.

8 Q. Let me ask you this before you get to 524.

9 A. Yeah.

10 Q. Do you recall that at some point during the
11 discussions with Kos a Mr. Bell got involved?

12 A. I think it was Mr. Bell. It was their CEO. I
13 think his name was Bell, yes. It rings a bell. I'm
14 sorry.

15 Q. And there came a time, again, during the
16 discussions with Kos that Mr. Bell wanted to be
17 involved, right?

18 A. Yes, he insisted to be involved, correct.

19 Q. And that's when the discussions got more
20 serious. Is that right?

21 A. No, it was towards the end of the discussions
22 really. I think the perception was that Mr. Patel was
23 supposed to carry the baton and really get the deal
24 done and that it was sort of languishing, because we
25 weren't really convinced to go forward, and our

1 analysis was taking longer and longer periods of time,
2 and I think Mr. Bell wanted to move it forward, and he
3 was going to take it over and bring his personal
4 dynamism to bear.

5 Q. Okay, we will get to that in a little bit.

6 Now, I think you said on direct that Searle was
7 interested in obtaining the rights to market Niaspan in
8 Europe. Is that correct?

9 A. I think we were considering it for both areas,
10 yeah.

11 Q. And with respect to the marketing rights for
12 Europe, it was Searle's European group who was the
13 major driver for including European rights in the
14 agreement, correct?

15 A. Oh, sure, yeah.

16 Q. And the European people were the impetus for
17 wanting to discuss European rights for Niacor as well,
18 right?

19 A. Sure.

20 Q. And that's because the European sales force
21 wanted a product to promote in order to get ready for
22 this pipeline product?

23 A. Yeah, and then in general they wanted just more
24 pipe -- excuse me, products in general, yeah. They
25 were anxious for almost any product, but specifically

1 they were very anxious for a cardiovascular product.

2 Q. So, Searle was interested in a deal with Kos
3 that would have included U.S. rights and European
4 rights, correct?

5 A. Sure.

6 Q. And you wanted those rights in the same
7 agreement, at least initially, correct?

8 A. We would have negotiated them together if we
9 were going to go after them all, yeah.

10 Q. In fact, you wanted at least a right of first
11 refusal with respect to European rights, correct?

12 A. I think that was discussed. I think the
13 Europeans wanted that primarily at the initial stages,
14 yes.

15 Q. If you could turn to CX 523. Have you got
16 that?

17 A. Right.

18 Q. I am going to read from the -- this is really
19 the third paragraph on that, I've got it up on your
20 screen, too. It says, "Mr. Patel indicated, however,
21 that a company that does a U.S. deal would have a 'leg
22 up' on a European deal for the compound. I asked if
23 that amounted to a right of first refusal, and he
24 suggested that it was not a legally enforceable right
25 but a moral obligation. I suggested that we would want

1 something more concrete if we were going to commit to
2 U.S. co-promotion in support of the product. He
3 suggested that Europe was at least 6 months behind the
4 U.S. in terms of marketing and that the regulatory
5 issues in Europe would be complicating in terms of
6 price and other matters, so that Kos would like to get
7 the U.S. issues resolved now and deal with Europe at a
8 later stage -- as a later stage issue. I suggested we
9 would want to deal with both in the same arrangement."

10 That is your -- you authored this document,
11 correct?

12 A. I believe so, yes.

13 Q. Now, Kos wanted to defer discussion of European
14 rights, correct?

15 A. Yeah, they wanted to delink them, decouple
16 them.

17 Q. Now --

18 A. At least here they did.

19 Q. Excuse me?

20 A. At least at this juncture in this document they
21 did.

22 Q. Searle ultimately declined the Kos opportunity,
23 right?

24 A. That's correct.

25 Q. And that was after you met -- had a meeting in

1 New York. Is that right?

2 A. Yes.

3 Q. And that was with Dan Bell?

4 A. I believe -- if it's Dan, yes, but Mr. Bell was
5 all I could recall.

6 Q. Kos' CEO.

7 A. Right.

8 Q. And that meeting took place in December of
9 1997. Is that correct?

10 A. I don't know if it was December or early in the
11 new year. I don't recall the dates exactly.

12 Q. Why don't we look at CX 525.

13 A. Okay.

14 Q. Do you recognize that document?

15 A. Just a minute, let me read it. (Document
16 review.) Yes, I do.

17 Q. And does that refresh your recollection, sir,
18 as to when the meeting with Dan Bell or Mr. Bell, the
19 CEO of Kos, was in New York?

20 A. It suggests it was December 17th. I don't
21 necessarily recall that, but I assume that must be the
22 date.

23 Q. That's not inconsistent with your recollection,
24 is it?

25 A. No.

1 Q. Now, referring to Mr. Bell, the terms that he
2 was talking about for proceeding with a co-promote
3 arrangement for U.S. rights, those terms weren't
4 reasonable, were they?

5 A. They weren't things that we were willing to
6 respond to, no. From our perspective, they weren't the
7 basis of talking through a deal, correct.

8 Q. They weren't even the basis for discussion,
9 right?

10 A. No, we just politely sort of said thank you for
11 your continued interest and we wish you continued
12 success and basically didn't pursue it much after that.

13 Q. Now, Kos wanted an up-front payment, I think
14 you said?

15 A. Yeah, I think they were looking for an up-front
16 payment. He was signaling, I don't know, tens of
17 million dollar kind of area, kind of range, could have
18 been 10, could have been 20. He specifically wanted to
19 be vague, but he -- his references, as I recall, were
20 to an up-front payment that wouldn't make the product
21 look cheap or something else like that, some reference
22 to that kind of concept.

23 Q. He must have been pretty proud of his product
24 it seems like, huh?

25 A. It was his only product really.

1 Q. Now, what you thought was ridiculous was the
2 percentage of the profits that Kos wanted, right?

3 A. That's where the money was. I mean, the
4 up-fronts are really window dressings on one of these
5 deals. They do change the risk profile. If you put up
6 a lot of up-front money, that's sunk money. Typically
7 a big pharma player will use up-fronts to buy down the
8 upside. In other words, if a guy wants a relatively
9 big up-front, for whatever reason, you know, he wants
10 to go to the stock market and say, look, they're
11 willing to pay \$20 million, usually you only pop up an
12 up-front in that neighborhood when you have absolutely
13 won the point on what split of values you want and
14 you've done that bigger deal.

15 So, typically, if you're in a negotiation with
16 a biotech, you put in big up-front payments if you have
17 a very favorable split of the revenues going forward.

18 Q. Well, regardless of all of that, I mean, the
19 terms that you thought were ridiculous that Kos was
20 talking about, those were really related to the split
21 of the revenues he was proposing, right?

22 A. Split of the revenues and I think the
23 up-fronts, as well. I mean, usually people when they
24 start these negotiations put the stake in the ground
25 and give you a signal as to what area they are going to

1 be flexible about. Mr. Bell basically felt he was
2 going to push to a close that would have both favorable
3 up-front and milestone payments and favorable splits of
4 revenue, and we weren't really interested in responding
5 to either.

6 MS. SHORES: Just bear with me one second.

7 (Counsel conferring.)

8 BY MS. SHORES:

9 Q. But again, just back to my question, one of the
10 things you thought was ridiculous at least was the
11 split of the profits that Kos wanted, right?

12 A. Unreasonable. I wouldn't say ridiculous, but
13 unreasonable, yes. Certainly nothing that we could
14 work with commercially.

15 Q. If you could turn to page -- your deposition is
16 in the front of that binder, I think.

17 A. Okay.

18 Q. Turn to page 58.

19 A. Right.

20 Q. Have you got that?

21 A. Yes.

22 Q. There's a question there, sort at the bottom
23 half of the page:

24 "QUESTION: What were the terms?"

25 And again, this is referring to Kos and the New

1 York meeting, I believe that's clear.

2 A. Um-hum, um-hum.

3 Q. "ANSWER: Oh, they were asking for an up-front
4 payment of, you know, \$10 million, \$5 million,
5 something like that. I mean, it was not written down,
6 it was something like that, but it was -- they were
7 looking -- the terms that were more ridiculous was they
8 were looking for a huge slug of the profits where we
9 would be doing the majority of the promotion in the
10 United States and they would be taking the majority of
11 the profits and that was a nonstarter, that was never
12 going to go anywhere."

13 A. Right.

14 Q. That's correct, right?

15 A. That is correct.

16 Q. And according to your testimony, it was
17 ridiculous for Kos to ask for that, because Searle
18 would be doing most of the promotion, right?

19 A. According to my testimony -- well, yeah, Searle
20 was going to be doing the promotion of the product with
21 an established professional sales force. Their sales
22 force was new, it was relatively small. Their name was
23 hardly known, ours was established. We had a
24 franchise, they didn't.

25 This was a heavily detail-sensitive product for

1 value, and so we'd be conferring the lion's share of
2 the value and the effort, and they would be getting a
3 disproportionate share of the income.

4 Q. And Kos, in connection with this co-promote
5 arrangement, was expecting something like 900,000
6 details per year. Isn't that true?

7 A. I think that's the number, somewhere around
8 there.

9 Q. And that's the level of detailing that one
10 reserves for a blockbuster product. Isn't that right?

11 A. I don't know necessarily if it's a blockbuster,
12 but it's a lot.

13 Q. If you could turn to 524, CX 524.

14 A. Sure. Yes.

15 Q. Let me throw this up here.

16 Referring to the second paragraph, do you see
17 that?

18 A. "The Kos 'vision,'" yes.

19 Q. This is an e-mail you wrote, correct?

20 A. That's correct.

21 Q. It says here, "The Kos 'vision' for Niaspan
22 requires 900,000 details per year," then I am going to
23 skip down to the last sentence where it says
24 "Multiply."

25 "Multiply the nine details per doc times the

1 100,000 total doc's in the top 7 deciles of
2 dyslipidemia prescribers and the number comes out
3 900,000 -- about the level given to most novel -
4 long-term patent protected potential blockbusters,"
5 correct?

6 A. Right. I guess that's right, yeah.

7 Q. And Kos was expecting Searle to deliver about
8 700,000 of those details, right?

9 A. If we were going to put the full 600 sales reps
10 to it and they were going to do their 130 or 150,
11 whatever it was going to be, that was sort of a
12 starting position for them. I think they wanted to
13 grow their sales force over time and take over a
14 greater proportion of it over time, and we would do
15 progressively less.

16 Q. But Kos was looking for Searle to deliver
17 700,000 of those details, correct? It's in the third
18 paragraph from the bottom of the page you're on now,
19 second page.

20 A. Second page, third from the bottom?

21 Q. Um-hum.

22 A. Yeah, 700,000 is what it looks like, yeah.

23 Q. Okay. And you estimated that that would
24 require Searle to spend at least \$35 million in
25 marketing per year, right?

1 A. Right, but that's also in the context of us
2 having other details that we were doing. It's a
3 question of whether it's first position, second
4 position or third position. There are different costs
5 at different levels. I don't think we were ever
6 talking about first position marketing.

7 MS. SHORES: Move to strike everything after
8 "yes," Your Honor -- I'll take it back, never mind.

9 BY MS. SHORES:

10 Q. All right, and that sort of investment wasn't
11 worth it given the profit split that Kos was
12 requesting.

13 A. That was the way we anticipated it, yeah.

14 Q. Sir, do you know how the liver toxicity of the
15 Niacor-SR product compares to Tricor?

16 A. I'm not familiar with Tricor at this point.

17 Q. How about Lescol, do you know how the liver
18 toxicity levels suggested in the Niacor presentation
19 compare with Lescol?

20 A. Well, Lescol is an HMG-CoA reductase inhibitor,
21 and I think the major problem with Lescol isn't related
22 so much to ALT elevation but rhabdomyolysis.

23 Q. So, your answer is no?

24 A. No what?

25 Q. You don't know how the liver toxicity issue

1 compares?

2 A. In what -- in what fashion? I mean, in terms
3 of total quantitative differences? The liver toxicity
4 of Niacor-SR is more pronounced in my experience than
5 it is on Lescol.

6 Q. More pronounced than Lescol?

7 MS. BOKAT: Objection, Your Honor. I think
8 this goes beyond the scope of direct. I don't believe
9 I got into Lescol at all.

10 JUDGE CHAPPELL: Well, it depends, Ms. Shores.
11 Are you getting into toxicity or Lescol here?

12 MS. SHORES: Well, I think I'll withdraw the
13 last question and let his previous answer stand.

14 JUDGE CHAPPELL: Okay, thank you.

15 MS. SHORES: Thank you. No further questions.
16 Redirect?

17 MS. BOKAT: Yes, please.

18 JUDGE CHAPPELL: Do you need a moment?

19 MS. BOKAT: Yes, please.

20 JUDGE CHAPPELL: Go ahead.

21 (Pause in the proceedings.)

22 MS. BOKAT: Thank you, Your Honor. May I
23 proceed?

24 JUDGE CHAPPELL: Yes, you may.

25 REDIRECT EXAMINATION

1 BY MS. BOKAT:

2 Q. Mr. Egan, when you were talking to Mr. Curran
3 about the meeting between Upsher-Smith and Searle, you
4 said that you didn't remember the Upsher-Smith
5 attendees in part because of the passage of time. Was
6 there another reason you didn't remember them?

7 A. Well, I wasn't the point of contact for them,
8 and I had never -- I mean, the major point of contact
9 obviously was Mary Schwab, but I think the major reason
10 there was also because I didn't have any other
11 opportunities beyond this to interact with them. It's
12 one meeting, a one-off kind of meeting, and normally
13 with licensing people, it's a relatively small
14 fraternity, and you know almost everybody in the
15 licensing area, you know, not necessarily socially but
16 as business colleagues, and you try to develop these
17 networks, and frankly, the passage of time, and the
18 other one is just that they were a relatively small
19 company, and this seemed to be a unique situation for a
20 company that was mainly, you know, formulations and
21 things like that. So, I didn't really have much other
22 opportunity to interact with them.

23 Q. You testified in response to questions that
24 some of your recollections of that meeting were vague.
25 Do you have some clear recollections of the meeting

1 with Upsher-Smith?

2 A. Absolutely, I do.

3 Q. What do you clearly remember about it?

4 A. I clearly remember that the toxicity associated
5 with the product in the clinical trials as reported in
6 the overheads was remarked on by my scientist, and the
7 comments he made rung true to me in front of -- with
8 the data that was in front of me at hand, and you know,
9 I remember a conversation immediately thereafter saying
10 don't do anything more on this. This one has toxicity
11 issues, and it will not go.

12 Q. Again, in your --

13 A. And just to elaborate on that.

14 Q. I'm sorry.

15 A. In terms of remembering what does or doesn't
16 happen at a meeting, for me the key thing was, you
17 know, why was the meeting to have occurred at all. We
18 clearly were interested in, you know, having a niacin
19 product. We wanted to give it every opportunity to
20 evaluate it. We were keenly interested in pursuing
21 one, and we only reluctantly took a pass on it, even
22 though, you know, we had known the issues on it, but in
23 the sense of if it had not had a toxicity issue, we
24 sure would have been interested in pursuing it. If it
25 had a better therapeutic interest, you know, the whole

1 reason we wanted to have a meeting was to pursue it,
2 not to say no to it.

3 Q. Again, in talking with Mr. Curran, you
4 mentioned that drugs in phase III clinical trials might
5 still fail. Given that Niacor-SR was already in phase
6 III trials, was there a need to look at the data
7 presented by Upsher-Smith?

8 A. Sure there was. I mean, one of the things is
9 that this is a formulation change, and although the
10 rules versus de novo drug testing and formulation
11 change testing have changed at the FDA as to how robust
12 you must be with a new formulation of an existing
13 compound, the fact of the matter is that they were
14 claiming that this would improve the therapeutic index.

15 In other words, you've got increased benefit
16 with either equal or less side effects and toxicity
17 profiles.

18 MS. SHORES: Objection, move to strike. It
19 sounds like expert testimony to me. Lack of
20 foundation.

21 MR. CURRAN: Same objection, Your Honor.

22 MS. BOKAT: Mr. Egan was testifying based on
23 the information that was provided to him in that
24 meeting.

25 JUDGE CHAPPELL: Well, I am going to sustain

1 the objection and disregard everything after the answer
2 to your question, which was, "Sure there was."

3 BY MS. BOKAT:

4 Q. In the deals you've been involved in at Searle
5 and Abbott where your company actually did take an
6 in-license, were you ever able to complete your review
7 of the licensed product in seven days?

8 MS. SHORES: Objection, Your Honor, this goes
9 beyond what was necessary to lay a foundation for his
10 testimony about the Upsher and Kos negotiations. Now
11 he's straying from what Mr. Orlans promised that this
12 testimony would be introduced for.

13 MS. BOKAT: On --

14 MR. CURRAN: Same objection, Your Honor.

15 JUDGE CHAPPELL: Are you trying to turn him
16 into a due diligence expert?

17 MS. BOKAT: No, but during Ms. Shores' cross,
18 she went into the length of time it takes to evaluate a
19 licensing opportunity.

20 JUDGE CHAPPELL: Well, I am going to sustain
21 the objection as worded. You may try to rephrase if
22 you like.

23 BY MS. BOKAT:

24 Q. In the deals you've been involved in where your
25 company actually signed an agreement for an in-license,

1 have you ever completed the analysis of the product in
2 seven days or less?

3 MR. CURRAN: Same objection, Your Honor.

4 MS. SHORES: Same objection, Your Honor. Mr.
5 Orlans stated as follows during the hearing, he said,
6 "The only need to discuss the procedures that Searle
7 utilized is simply to put into context Searle's
8 consideration of these two products, not to have the
9 Searle witness testify as an expert on licensing or to
10 hold up Searle's licensing procedures as procedures
11 that were generalizable to the entire industry, but
12 simply to provide that sort of factual background."

13 JUDGE CHAPPELL: I understand that, but what
14 about her point that you raised this issue on cross?

15 MS. SHORES: Well, I don't think I raised the
16 issue that would permit him to give general testimony
17 that would compare it to how much due diligence
18 Schering did or anybody else in the industry.

19 JUDGE CHAPPELL: And tell me again what you are
20 redirecting him on from the cross exam.

21 MS. BOKAT: Whether he has --

22 JUDGE CHAPPELL: You may confer.

23 MS. BOKAT: Thank you, Your Honor, whether he
24 has ever analyzed a product and actually signed a
25 license in seven days or less.

1 JUDGE CHAPPELL: Okay, but what is that based
2 on that Ms. Shores asked him on cross?

3 MS. BOKAT: Well, what I have in my notes is
4 length of time to analyze -- to evaluate a license. I
5 wonder whether we can find it.

6 All right, I think the question and answer went
7 to whether the time period for evaluating a license
8 opportunity varied with the product or with the license
9 opportunity.

10 JUDGE CHAPPELL: I am going to sustain the
11 objection. You can ask him about the Niaspan and the
12 Niacor deals only in that regard.

13 BY MS. BOKAT:

14 Q. You mentioned in answer to one of Ms. Shores'
15 questions that -- and I think you were referring to
16 Niaspan -- that it was a detail-sensitive product.
17 What did you mean by that?

18 A. What I meant by that is that in terms of the
19 total value of a product asset, you can often look to
20 different aspects of how the product's valued, its
21 patent coverage, its novelty, its skill at being
22 registered for a particular label claim, or its skill
23 at being marketed. When you looked at this product,
24 Niaspan, since it was just a reformulation and new dose
25 regimen recasting of an existing, well-established

1 generic and not necessarily very novel composition of
2 matter, that the lion's share of the value driven out
3 of that product would come from the sales and marketing
4 detailing of the product and not from the product's
5 development and intrinsic characteristics.

6 Q. When you were looking at Upsher's Niacor-SR,
7 did you consider whether it would be a detail-sensitive
8 product?

9 A. We didn't get that far.

10 Q. When you were talking to Kos, did you know what
11 products Kos had in development?

12 A. Yes.

13 MS. BOKAT: I have nothing further, Your Honor.

14 JUDGE CHAPPELL: Mr. Curran?

15 RECROSS EXAMINATION

16 BY MR. CURRAN:

17 Q. Mr. Egan, do you remember just a moment ago
18 when Ms. Bokat asked you about your recollections of
19 the meeting on May 28th, 1997?

20 A. Yes.

21 Q. And you stated that you had a specific
22 recollection of discussions of liver toxicity at that
23 meeting, correct?

24 A. Right.

25 Q. Dr. Claude Drobnes was the representative from

1 Upsher-Smith who addressed that issue, correct?

2 A. I don't recall whether it was Claude Drobnes or
3 not.

4 Q. Well, can you look at the agenda for the
5 meeting, sir? That's in the -- it's not in the binder
6 you have in your lap, it's in the other thick document
7 there, I believe, it's the first interior page.

8 A. Oh, here we go, yes, right.

9 Q. And that indicates that --

10 A. Claude Drobnes was the doctor who was there,
11 yeah.

12 Q. Right. What's your recollection of what Dr.
13 Drobnes said at that meeting about liver toxicity?

14 A. I believe my recollection is what's stated in
15 the overheads, and my recollection is more of a private
16 side conversation with Jim Stolzenbach and in one
17 immediately following the meeting with Jim Stolzenbach.

18 Q. Listen to my question. What was said in that
19 meeting by Dr. Claude Drobnes?

20 A. Things he specifically said about --

21 MS. BOKAT: Objection, hearsay.

22 MR. CURRAN: Your Honor, I think it's palpably
23 obvious I'm not asking this for the truth of the matter
24 but only to establish that this witness has no
25 substantive recollection of what actually was said in

1 this meeting.

2 JUDGE CHAPPELL: I'll allow it. Overruled.

3 THE WITNESS: I don't remember his exact words.

4 However --

5 BY MR. CURRAN:

6 Q. Sir, you have answered that question. Now I've
7 got one more.

8 You don't even remember that Dr. Claude Drobnes
9 is a woman, do you?

10 A. No.

11 MR. CURRAN: Nothing further, Your Honor.

12 MS. SHORES: Nothing for Schering, Your Honor.

13 MS. BOKAT: Nothing, Your Honor, thank you.

14 JUDGE CHAPPELL: Thank you, sir, you're
15 excused.

16 THE WITNESS: Thank you.

17 MS. BOKAT: May I approach and clear the paper
18 from the witness stand?

19 JUDGE CHAPPELL: Yes, you may.

20 You may step down, sir.

21 THE WITNESS: Thank you.

22 JUDGE CHAPPELL: Anything before we adjourn for
23 the weekend?

24 MR. NIELDS: Not from us, Your Honor.

25 MR. CURRAN: Nothing from Upsher-Smith, Your

1 Honor.

2 MS. BOKAT: Well, I'm going to jump under the
3 bridge if I may, Your Honor.

4 I was looking for some general guidance on when
5 we should be preparing closing argument, just so we
6 have a sense of should we be looking at ten days from
7 now or a month from now? Personally, that would help
8 my planning.

9 JUDGE CHAPPELL: Are you really asking whether
10 you should be looking at the last day of evidence or
11 after the briefing's done? Is that where you're going?

12 MS. BOKAT: That would be very helpful.

13 JUDGE CHAPPELL: Well, normally, when the case
14 is over, I hear closing argument, but I am intrigued by
15 the possibility of the parties arguing after briefing's
16 done, because I know that that would allow you to
17 focus, and dare I say, somewhat condense the arguments
18 you would make.

19 I'm doing some research on the idea of how to
20 treat it in the record, because I've got instructions
21 in the rules that I need to close the record as soon as
22 possible. So, I'm looking into that, and I'll let you
23 know. Either way, it won't be before next Friday, if
24 that helps, but if I think I can find a way to do it in
25 the rules, I'm going to allow the argument after the

1 briefing. That's what I'm looking into at this time.

2 MS. BOKAT: Your Honor, I don't have a full
3 cite for you. Conferring with colleagues at the FTC a
4 bit ago, I ran into one gentleman who said in the Toys
5 'R Us case, they had oral argument after the briefs
6 were submitted, although I have to confess, he told me
7 in that one they had two arguments.

8 JUDGE CHAPPELL: Well, and I -- that comes
9 under the heading of "it's always been done that way,"
10 I've heard that, but as I've done since I came to this
11 position, whenever I hear that, I look for support in
12 the rules. If it's not there, the way it's been done
13 doesn't matter to me. So, I'm looking -- I'm doing my
14 own research, but I like the idea of doing the argument
15 after the briefing's done, and that's where I'm headed
16 right now.

17 MS. BOKAT: Thank you, Your Honor.

18 JUDGE CHAPPELL: And I believe we have one
19 witness Monday?

20 MS. BOKAT: Professor Bresnahan.

21 JUDGE CHAPPELL: We will start at 11:00. We're
22 adjourned.

23 (Whereupon, at 4:00 p.m., the hearing was
24 adjourned.)

25

1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: MARCH 15, 2002

5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 3/18/02

13

14

15

16 SUSANNE BERGLING, RMR

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025